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No. 92-1818

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CLYDE BELLECOURT,

Petitioner,

vs.

UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS, J. MICHAEL QUINLAN, THE FEDERAL MEDICAL CENTER, ROCHESTER, MINNESOTA, DR. MICHAEL TRUJILLO, CLIFF FRIESE, PETER CARLSON, DR. ALAN WYNNE, AND SARAH URRISTE,

Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Amendment precludes cruel and unusual punishment in the form of an easier and less efficacious treatment of a prisoner's serious medical needs.

2. Whether it is proper to depart from statutory criteria in medical malpractice actions by expanding the need for an expert Affidavit.

3. Whether the presumption of receipt upon mailing is applicable as related to the filing a Federal Tort Claims Act claim.

LIST OF PARTIES

The parties to the proceedings below include Clyde H. Bellecourt as Petitioner, who was Plaintiff in District Court and Appellant in the Eighth Circuit Court of Appeals.

The named Defendants are the United States of America; the Federal Bureau of Prisons; the Federal Medical Center, Rochester, Minnesota, where Mr. Bellecourt was confined at the time of the events herein; J. Michael Quinlan in his capacity as Director of Federal Bureau of Prisons; Dr. Michael Trujillo, Medical Director of Federal Medical Center, Rochester; Cliff Friese, Guard at Federal Medical Center, Rochester, Peter Carlson, Warden of Federal Medical Center, Rochester; Dr. Alan Wynne, the treating Physician, who

provided services to Plaintiff at the Federal Medical Center, Rochester; and Sarah Urriste, a Physician's Assistant at the Federal Medical Center, Rochester. Respondents were Defendants in District Court and Appellees in the Eighth Circuit Court of Appeals.

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Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

The Petitioner, Clyde H. Bellecourt, prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on July 19, 1993. The Petitioner's Petition for Rehearing was denied July 19, 1993.

OPINIONS BELOW

The United States District Court for the District of Minnesota issued its Order dismissing Plaintiffs Federal Tort Claim for lack of jurisdiction and granting summary judgment to the Defendants on the remaining claims. The Order appears at 784 F.Supp. 623 (D. Minn. 1992), and which is reprinted within Petitioner's Appendix at p. 23.

Petitioner made a timely appeal to the United States Court of Appeals for the Eighth Circuit. On May 14, 1993, a panel of the United States Court of Appeals for the Eighth Circuit issued its determination affirming the decision by the District Court. This Opinion is published at 997 F.2d 427 (8th Cir. 1993) and appears within the Appendix at p. 1. Petitioner petitioned for an en banc rehearing from the United States Court of

Appeals for the Eighth Circuit which on July 19, 1993, was denied. The Order denying the en banc hearing appears within the Appendix at p. 22.

JURISDICTION

The determination by the United States Court of Appeals for the Eighth Circuit is sought to be reviewed. The determination of the Eighth Circuit panel is published at 994 F.2d 427 (8th Cir. 1993) and contained within the Appendix. It was filed on May 14, 1993. The panel decision affirmed the determination of the District Court, which appears at 784 F.Supp. 623 (D. Minn. 1992). A Petition for Rehearing with Suggestion of En Banc consideration was filed with the Eighth Circuit and was denied on July 19, 1993.

Jurisdiction to review the judgment of the Eighth Circuit in this civil case

by writ of certiorari is conferred upon this Court by 28 U.S.C. §2101(c), in compliance with Rules 20 and 29.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The constitutional provision herein involved is the Eighth Amendment to the United States Constitution. It provides that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The statutory provisions herein involved are 28 U.S.C. §2671-2680 (the Federal Tort Claims Act) and Minnesota Stat. §145.682.

STATEMENT OF THE CASE

Plaintiff/Appellant/Petitioner Clyde H. Bellecourt ("Petitioner") seeks damages

for physical and emotional injury, together with pain and suffering incurred when he was denied treatment for a myocardial infarction (commonly termed a "heart attack") he was experiencing by the contract doctor and prison officials, while incarcerated at the Federal Medical Center, Rochester, Minnesota (FMC). He asserts violations of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671-2680, the Eighth and Fifth Amendments to the United States Constitution, and 42 U.S.C. §1981(c), 1985 and 1986. He additionally asserts a Minnesota State statutory medical malpractice claim under the pendant jurisdiction of the District Court.

At the Federal Medical Center, Rochester, on September 16, 1987, at approximately 12:30 a.m. Petitioner experienced severe pain in his chest and

right arm, and he was unable to close his right hand. (Appendix p. 179) (hereinafter "Appdx."). He instructed his cell mate to notify the prison office. (Appdx. p. 179).

Respondent Lieutenant Cliff Friese, responded to the call and Petitioner advised that he believed he was in the midst of a heart attack. Respondent Dr. Alan Wynne was summoned and examined Mr. Bellecourt. Mr. Bellecourt stated he believed he was experiencing a heart attack and specifically requested use of the cardiogram. (Appdx. p. 290). When asked about the severity of his pain Petitioner rated it a ten (10) on a scale of zero to ten (0 to 10). Dr. Wynne asked Mr. Bellecourt if he had experienced pain like that previously. Mr. Bellecourt said that he had been shot just below the heart in 1973, and that the pain was far worse than the pain of being shot. (Appdx. p.

180). Dr. Wynne administered two tablets of nitroglycerin which partially relieved the pain for a few seconds. Dr. Wynne then diagnosed the pain as indigestion and gastritis. Mr. Bellecourt became very upset because he was sure that he was having a very serious heart attack and that Dr. Wynne was refusing to test or treat him for it. Mr. Bellecourt advised that he had no problems digesting food and no medical history of stomach problems. He requested that he be taken to the hospital for an electrocardiogram. However, Dr. Wynne refused and advised Petitioner that he had only gastritis and gave him an antacid. (Appdx. p. 182). An electrocardiogram was available but Dr. Wynne declined to use it because it was in a different building and it was raining, and he was unfamiliar with the tunnel between buildings. (Appdx. pp. 264-265).

As the doctor and guard left the cell, Lieutenant Friese told Mr. Bellecourt to keep quiet unless he wanted to go to the "hole". (Appdx. p. 291).

Petitioner was in continuous pain throughout the night. He was afraid to go to sleep for fear that he would not awake. He eventually blacked out. (Appdx. p. 183).

Petitioner awoke the next morning in extreme pain and reported to the clinic at the institution at about 7:20 a.m. He met with, and informed, Respondent Sarah Urriste, a Physician's Assistant, of his pain. She asked him to rate his pain, and he rated it at an eleven (11) on a scale of zero to ten (0 to 10). She told him to have a seat in the waiting room and he would be taken care of. Petitioner was not seen by a doctor until almost two hours later when a dentist interceded and

secured medical attention. (Appdx. pp. 184-186). The existence of a heart attack was confirmed and he was taken to a hospital for treatment. (Appdx. p. 186). It was determined that one of his coronary arteries was closed (Appdx. p. 186). [1]/

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[1]/ The facts as relied upon by Petitioner as to events following his distress call are significantly different from those relied upon by the District Court and the panel. Both Courts reflect the Respondents' account of these disputed facts. Petitioner's account is supported by his claim (Appdx. p. 177) and Affidavit (Appdx. p. 285). The Courts departed far from the accepted rule by viewing the facts upon summary judgment in the light most favorable to Respondents. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Both Courts below ignored the facts presented by Petitioner and based their rulings on the facts presented by Respondents. Dr. Wynne's testimony was regarded as dispositive as to Mr. Bellecourt's pain and the interaction between them. (Appdx. pp. 68-69).

Dr. Wynne sought to distinguish his practice at FMC from that of an emergency room by stating that an electrocardiogram was not readily available. However, he also admitted that an electrocardiogram could have been brought to Mr. Bellecourt and was available. (Appdx. p. 266). Dr. Wynne's testimony that Mr. Bellecourt reported a low level of pain (Appdx. p. 260) is a disputed fact. Mr. Bellecourt states he reported his pain as a "10". Mr. Bellecourt states that he implored Dr. Wynne to treat him for a heart attack, take him to a hospital and have an EKG done. (Appdx. p. 181). Dr. Wynne does not include such an account in his interview.

The context of Dr. Wynne's visit, on the facts presented by Petitioner, clearly required for effective treatment the utilization of an available diagnostic tool to detect whether a heart episode was in progress. Petitioner in the middle of the night at 12:30 asked his roommate to notify the Lieutenant's office that he felt he was having a heart attack. (Appdx. p. 179).

Mr. Bellecourt stated he "was experiencing severe pain in my chest, my right arm and I was unable to close my right hand." Lieutenant Friese responded to his call along with several guards. Petitioner told Mr. Friese that he was experiencing pain in his chest and arm and had trouble closing his right hand. Mr. Bellecourt told Friese that "I was sure that I was having a heart attack." (Appdx. p. 179).

The Lieutenant in response to the emergency, had immediately radioed for help and shortly thereafter Dr. wynne appeared. Dr. Wynne kept asking Mr. Bellecourt to rate his pain on a scale of one to ten and Mr. Bellecourt rated it as ten. When Dr. Wynne began to diagnose the pain as gastritis, Mr. Bellecourt attempted to specifically rule that out by stating that he had "no problems digesting food" (Appdx. p. 181) and that it had been eight (8) hours since he had dinner. Mr. Bellecourt implored Dr. Wynne to take him to a hospital and to administer an electrocardiogram (Appdx. p. 181).

Mr. Bellecourt had a history of smoking of which Dr. Wynne was advised. (Appdx. p. 257). (Appendix of Appellee Wynne W-20).

Dr. Wynne admits that Bellecourt stated he was having chest pain and Dr.

Wynne suspected it was a heart problem (Appdx. p. 251). He states that he asked Bellecourt whether he had shortness of breath and Bellecourt said yes. Dr. Wynne states there was no family history of coronary problems. This is contradicted by the Referral Summary. (Appdx. pp. 196-198). [2]/

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[2]/ The District Court, rather than consider the facts in the light most favorable to Petitioner, quarrelled with Petitioner's facts stating as to Respondent Friese that "Lieutenant Friese had no reason to believe that plaintiff required additional assistance." (Appdx. p. 64) The Court ignored the facts that Petitioner reported severe pain, implored the doctor for help in treating his heart attack, and requested an EKG. They also ignored that Lieutenant Friese threatened Mr. Bellecourt. As to Physician Assistant Sarah Urriste who denied access to a doctor for several hours after Petitioner reported to the clinic, the District Court ignored the facts offered by Petitioner and concluded that treatment was given upon Mr. Bellecourt's arrival at the clinic.

Dr. Wynne's report of the visit with petitioner was accepted in its entirety without mention of the conflicting facts offered by Petitioner. The District Court found that Dr. Wynne "thoroughly examined" Petitioner, and that his "pain seemed to subside" and "determined that an EKG was unnecessary at that time." (Appdx. pp. 68-69). Petitioner's account was that his severe pain did not subside, there was no meaningful examination, and an electrocardiogram was not used because it involved transporting the patient or the equipment in the rain and was therefore

Petitioner mailed his administrative claim under the Federal Tort Claims Act to FMC on November 29, 1988. (Appdx. pp. 308-310). The Federal Defendants claim not to have received the claim, although several prison officials overheard conversations by other prison officials shortly after the date of mailing, related to the claim set forth within the Petition (Appdx. pp. 346-397). Petitioner initiated the instant action on September 18, 1989. Dismissal of the FTCA claim, and summary judgment in favor of Defendant as to all other claims, was ordered by the District Court on February 10, 1992. The Eighth Circuit affirmed on May 14, 1993. Mr. Bellecourt's Petition for Rehearing was

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inconvenient. (Appdx. pp. 264-265). The District Court's rendering of summary judgment with these facts in dispute and the Eighth Circuit Panel's acceptance of the version of disputed fact offered by the party seeking summary judgment, are an extreme departure from the established rule which requires this Court's attention.

denied July 19, 1993.

The instant Petition for a Writ of Certiorari is submitted to avoid conflict by the Eighth Circuit with other Circuit Court and Supreme Court precedent with regard to the Eighth Amendment and with regard to the standard for adequate presentment of Federal Tort Claims Act Claims. The instant Petition for Writ of Certiorari is also submitted to supervise the District Court and Eighth Circuit which have departed far from the usual course of judicial proceedings, as to Minnesota law regarding the requirement of an expert affidavit in proving a medical malpractice claim.

REASONS FOR GRANTING THE WRIT

A. The Eighth Circuit Decision Is In Direct Conflict With Supreme Court And Other Circuit Precedent As To Eighth Amendment Standards.

The Eighth Circuit Panel in its Order

of May 14, 1993 upheld the grant by the United States District Court, District of Minnesota, of summary judgment in Respondents favor. The Eighth Amendment prohibits the cruel and unusual punishment. The denial of appropriate medical treatment to a prisoner in serious medical need which results in unnecessary suffering or injury is prohibited by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97 (1978). It is therefore cruel and unusual punishment violative of the Eighth Amendment for a doctor within a prison to deny a patient an available electrocardiogram test when the patient is experiencing symptoms consistent with a myocardial infarction, and to abandon that patient to his cell in severe pain without treatment. This forms the basis of Petitioner's Eighth Amendment Claim against Respondents.

The Eighth Circuit Panel characterized events as a mere disagreement over treatment, not rising to an Eighth Amendment violation. The Panel found the belief of Dr. Wynne that he followed a reasonable course of treatment to be dispositive. The Panel did not address allegations against Respondents prison guard Friese and physician's assistant Urriste.

The cases cited by the Panel in support of its affirmance of the District Court determination as to the Eighth Amendment Claim were Estelle, supra; Smith v. Jenkins, 919 F.2d 90 (8th Cir. 1990); and Randall v. Wyrick, 642 F.2d 304 (8th Cir. 1981). However, in none of these cases is a doctor's belief as to the reasonableness of the course of treatment, regarded as dispositive for summary judgment.

The determination by the District Court and the Eighth Circuit departed significantly from Estelle, supra, and other Supreme Court precedent, thus requiring this Court's supervision.

In Estelle, supra, the Court set forth the standard for determining the existence of cruel and unusual punishment in the context of treatment of a prisoner's serious medical needs.

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," In re Kemmler, supra, the evils of most immediate concern to the drafters of the Amendment.

Estelle, supra, at 103.

Prevention of pain equivalent to torture, and possible lingering death, motivated Petitioner's pleas for medical attention. Mr. Bellecourt was abandoned

by Respondents Wynne and Friese overnight in his cell with an untreated myocardial infarction in progress. In reporting to the Prison Clinic the next morning he was required to wait by Respondent Urriste for over two hours without medical attention. He experienced severe pain with permanent injury resulting.

This Court in Estelle, supra, distinguished cases of simple negligence from those rising to a constitutional violation. The Court stated that deliberate indifference can be "manifested by prison doctors in their response to the prisoner's needs". Estelle, supra, at 104. Therefore, the Court made clear that not only lack of treatment but the manner of a the course of treatment could rise to a constitutional violation.

The Court in Estelle, supra, cited several cases as examples of deliberate

indifference being apparent through utilization of "easier and less efficacious treatment" in response to a patient's serious medical needs, thus leading to an Eighth Amendment violation. The Court cited Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974), in which a prisoner's severed ear was treated but not reattached; Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974) in which an injection of penicillin was administered to a prisoner known to be allergic to penicillin; and Martinez v. Mancusi, 443 F.2d 927 (2nd Cir., 1970), wherein a prison physician failed to administer a pain killer in connection with leg surgery. The above each respectively illustrate indifference to the patient's serious medical needs by selection of an easier and less efficacious course of treatment. The stated belief of the respective physicians

as to what constituted reasonable care was not dispositive of the claims asserted. Rather, each Court determined the scope of proper inquiry to determine whether an Eighth Amendment violation had occurred.

In abandoning the "easier and less efficacious" standard the Courts below failed to follow Supreme Court precedent and placed themselves in conflict with the other Circuits.

The Panel below also cited as controlling Randall, supra in which the Eighth Circuit found, "Appellant's difference of opinion over matters of expert medical judgment or prescribed course of treatment fails to state a federal constitutional question." Id. at 308. In Randall, supra, a prisoner with mild bursitis and back pain, was regularly treated utilizing a medically accepted course of treatment as to which he

disagreed. The Court found deliberate indifference was absent.

Randall, supra, bears no relation to the instant case in which there was a deliberate failure to utilize an available electrocardiogram to determine whether a heart attack was in progress. This constituted an abandonment of the patient during an emergency. The medically accepted course of treatment through utilization of an available diagnostic tool was not followed. (See, Opinion of Dr. Leupker, Appdx. p. 338). Dr. Wynne's beliefs do not mitigate his failure to utilize available diagnostic equipment nor the resulting grossly negligent misdiagnosis and abandonment while aware of symptoms reported by Petitioner, which were consistent with a myocardial infarction.

The patient called for medical assis-

tance stating that he believed he was having a heart attack and specifically requested an EKG while reporting the classic symptoms of a myocardial infarction. Dr. Wynne refused to test for a heart attack because the available electrocardiogram equipment was in another building, it was raining outside and he did not know of the tunnel connecting the two buildings (Appdx. pp. 264-265). Rather than arrange for a test for a myocardial infarction he chose to make the easier test for gastritis, and thereafter left Petitioner when he responded only slightly and briefly to simple medication. In choosing the easier and less efficacious treatment, Dr. Wynne deliberately chose not to test for a myocardial infarction or rule out the life-threatening alternative. He was indifferent to Mr. Bellecourt's plea for emergency assistance for a myo-

cardial infarction in progress.

The Panel did not address the standards for finding an easier and less efficacious treatment as cruel and unusual punishment but rather chose to characterize events as a mere misdiagnosis and as a disagreement over treatment. The Panel's silence on this central inquiry, signals an abandonment of such analysis, thereby placing the Eighth Circuit in conflict with Supreme Court precedent and the other Circuits.

The Fourth Circuit in Miltier v. Beorn, 896 F.2d 848 (1990), a strikingly similar case involving a prisoner's heart attack in a Virginia prison, reversed the summary judgment of the District Court to permit the trial to proceed to determine whether Defendant physicians had engaged in deliberate indifference contrary to Eighth Amendment requirements. The

doctors in that case had been aware of the patient's complaints of chest and arm pain but made no follow-up.

In Miltier, supra, the Fourth Circuit cited as precedent the determination by the Eleventh Circuit in Ancata v. Prison Health Services, Inc., 769 F.2d 700, 107 (11th Cir. 1985) which held that, "Intentional failure to provide service acknowledged to be necessary is the deliberate indifference proscribed by the Constitution." The Fourth Circuit in Miltier, supra, found a triable jury issue in the fact that the several doctors who tested the patient did not "perform the necessary diagnostic testing to rule out arteriosclerotic coronary heart disease." Miltier, supra, at 851. One Defendant doctor had "continued to treat her symptoms as non-cardiac related and failed to order a cardiac evaluation." Id. at

853. The patient eventually suffered a cardiac arrest without having been tested for heart problems.

In the instant case, the patient, Mr. Bellecourt, was in the very midst of a myocardial infarction when the doctor failed to test for or rule out coronary heart disease. Dr. Wynne had been summoned in the middle of the night for the specific purpose of treating a myocardial infarction in progress. He performed none of the necessary testing to rule out a cardiac episode and treated the symptoms as non-cardiac related gastritis. He failed to order a cardiac evaluation. An electrocardiogram was available and not used. Dr. Leupker advises that an EKG is a necessary diagnostic procedure for a patient presenting the symptoms of Mr. Bellecourt. (Appdx. pp. 342-343).

In Ancata, supra, the Eleventh

Circuit, considered a case where a prisoner had complained of several symptoms including severe pain, hyperventilation and double vision. He was treated with Ben Gay and Tylenol II. A Court-ordered referral to a neurologist resulted in a diagnosis of leukemia from which the prisoner subsequently died.

In Ancata, supra, at 704, the Eleventh Circuit adopted the Eighth Amendment standard stated by the Third Circuit in West v. Keve, 571 F.2d 158, 162 (1978)(citations omitted):

> "Although the Plaintiff has been provided with aspirin, this may not constitute adequate medical care. If "deliberate indifference caused an easier and less efficacious treatment" to be provided the Defendants have violated the Plaintiff's Eighth Amendment rights by failing to "provide medical care."

The Eleventh Circuit in Ancata, supra, found triable facts as to whether

deliberate indifference was exhibited through utilization of an easier and less efficacious treatment.

In Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989) a prison psychiatrist, following an interview with a prisoner, determined that the patient was in remission from depression and halted medication. The patient had nightmares and nausea, and returned for a follow-up interview. The patient was not returned to medications. The patient then gouged out his left eye and was placed on medication, but not lithium which is specifically used to treat depression. The Eleventh Circuit held that there were disputed issues of fact and upheld the denial by the District Court of summary judgment.

The psychiatrist argued essentially what the Eighth Circuit panel determined

in the instant case; that if a doctor actually treats the prisoner, then the Eighth Amendment has not been violated. The Eleventh Circuit held, however, that "grossly incompetent medical care or choice of an easier but less efficacious course of treatment" can constitute deliberate indifference. Id. at 1033. The existence, nature and degree of the omission and whether it rose to an Eighth Amendment violation was characterized as a contested fact issue to be decided at trial.

In the instant action there is a factual dispute regarding the nature of the omissions of Dr. Wynne. Plaintiff's expert, Dr. Russell Vincent Leupker is Director of the Division of Epidemiology, School of Public Health, University of Minnesota and a Professor of Epidemiology and Medicine at the School of Public

Health and Medical School of the University of Minnesota. He specifies within his affidavit that Dr. Wynne's behavior constituted an abandonment of treatment. (Appdx. p. 340). Respondents argued that Dr. Wynne treated Mr. Bellecourt within established medical procedures. The Courts below found the expressed belief of the doctor to be dispositive. In contrast, the Eleventh Circuit in Waldrop, supra, in similar circumstances found a factual dispute.

The facts presented by Mr. Bellecourt, taken in the light most favorable to his position, unquestionably present a prima facie case of an Eighth Amendment violation. The Eighth Circuit ruled in essence that medical treatment, even though easier and less efficacious cannot rise to deliberate indifference even if available diagnostic equipment was

unreasonably not utilized.

In Boretti v. Wiscomb, 930 F.2d 1150 (6th Cir. 1991) a prisoner was denied changes of dressing for a wound. The Sixth Circuit found causation of resultant unnecessary suffering constituting an Eighth Amendment claim. It relied upon its earlier case of Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976) in which it held that a prisoner may assert an Eighth Amendment claim arising from deliberate indifference to a serious medical need when forced to suffer needlessly when relief is readily available, but treatment is delayed. Westlake was cited in Estelle, supra, at 429 U.S. at 103, 97 S.Ct. at 290, as an example of a claim of unnecessary suffering. The Sixth Circuit, also in Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986) held that an actual injury is not a necessary prerequisite to

recovery of damages where physical pain or mental anguish is suffered.

The Panel in the instant action upheld without discussion the erroneous determination by the District Court that the delay in treatment did not rise to an Eighth Amendment claim. The District Court below cited in support of its decision Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990) a case involving a delay in treatment which was causative of pain but where the prisoner was treated with pain relievers. In the instant action, the attempt at pain relief by utilization of an antacid demonstrably failed. The Petitioner experienced and reported high levels of pain which went untreated. He was abandoned in severe pain.

The Panel determination affirming the District Court grant of summary judgment is also in conflict with the Ninth

Circuit. In the instant action, the Courts below found that evidence offered by Defendants of some treatment establishes the absence of an Eighth Amendment violation. In Ortiz v. City of Imperial, 884 F.2d 1312 (9th Cir. 1989), the Ninth Circuit in reversing summary judgment against a Plaintiff, held that Plaintiff "need not prove complete failure to treat." Quoting a previous case, the Court stated "access to medical staff is meaningless unless that staff is competent and can render competent care." Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988).

In Ortiz, doctors were alerted to a head injury received by a prisoner but they did not perform an examination and chose to treat for symptoms of alcohol withdrawal. In the instant action the doctor was aware of reported symptoms

consistent with a myocardial infarction and did not test for cardiac problems, but rather treated for gastritis over the prisoner's protestations. Treatment for gastritis is entirely ineffective and incompetent for a myocardial infarction.

In West, supra, the prisoner suffered from ankle joint thickening and varicose veins. An operation to correct the condition was delayed seventeen (17) months. The prisoner unnecessarily suffered great pain as a result. The prisoner after the operation was treated with aspirin for his pain, and was denied access to a physician. The Court found that even though the prisoner was receiving post-operative care, the issue whether he was being denied adequate care due to deliberate indifference to his needs, was an issue for trial upon his claim of Eighth Amendment violation. The

determination as to which review is sought herein is clearly at odds with Third Circuit precedent.

In Martinez, supra, a prisoner who had undergone surgery as to his right leg was required to walk by prison guards and physicians, despite the orders of his surgeons, and was denied prescribed pain killers. This denial of adequate care resulted in physical pain and mental anguish. The Second Circuit deemed the issues sufficient for trial, and thus reversed the dismissal of Plaintiffs claim by the District Court. In contrast, the Courts below found that the denial of testing as to Petitioner was merely a disagreement over treatment.

In Williams, supra, a portion of a prisoner's ear was cut off during a fight with another prisoner. The doctor chose not to reattach the severed portion. The

Second Circuit reversed the summary judgment in favor of Defendant doctor entered by the District Court, stating that because there was a possibility that "deliberate indifference caused an easier and less efficacious treatment to be consciously chosen by the doctors" summary judgment was inappropriate. [3]/

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[3]/ Each Circuit Court of Appeals recognizes the deliberate indifference standard for the Eighth Amendment. The Seventh Circuit in Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985), recognized the deliberate indifference standard where a prisoner was confined for nine days in body restraints because he was suspected of being suicidal. The restraints caused itching, headaches, and a rash. No medical assistance was offered. The Seventh Circuit reversed summary judgment because the prisoner was deprived of exercise, clothing and because of the unsanitary condition of his cell.

The Fifth Circuit in Partridge v. Two Unknown Police Officers of the City of Houston, Texas, 751 F.2d 1448, opinion withdrawn 755 F.2d 1126, opinion substituted 791 F.2d 1182 (1985), recognized that failure to take steps to save a suicidal prisoner from injuring himself may evince deliberate indifference.

The Tenth Circuit in Garcia v. Salt Lake County, 768 F.2d 303 (1985), upheld an award to the estate of a deceased who had died while in custody on a drug overdose. No medical personnel were available in the jail to treat him. He was unconscious and received first aid only.

The First Circuit in Watson v. Caton, 984

In the instant action, Respondent Dr. Wynne chose an easier and less efficacious treatment. The Eighth Circuit, and the District Court abandoned the appropriate analysis to determine the existence of an Eighth Amendment issue and found no triable issues. Dr. Wynne's treatment through administering an antacid rather than performing an electrocardiogram was an easier and less efficacious treatment because it was inconvenient to transport the patient or EKG in the rain and he was not aware of a tunnel between buildings.

The Eighth Circuit in the instant case has abandoned Supreme Court precedent and is in conflict with the other circuits. The Eighth Circuit also has abandoned, without distinguishing, its own

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F.2d 537 (1st Cir. 1993), vacated dismissal of a claim where a prison nurse refused treatment to a prisoner's injured hand which subsequently required surgery, finding that deliberate indifference may be found on such facts.

precedent. [4]/

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[4]/ Recent Eighth Circuit cases illustrate the Supreme Court rule from which the instant Panel decision is a radical departure.

In Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981) the Eighth Circuit upheld a verdict finding deliberate indifference wherein a prisoner complained of a broken hand that was initially treated with ice. A physician several days later diagnosed the hand as badly bruised, but did order an x-ray, which revealed a fracture. It is highly aberrant that the Panel would deny a trial to the victim of a heart attack, initially treated with an antacid, and not diagnosed until the following day, while available EKG equipment was not utilized.

In Mullen v. Smith, 738 F.2d 317 (8th Cir. 1984) a prisoner tripped and injured his back and head. He received no substantive medical attention for four hours. His condition was not properly diagnosed, and he was given valium. Suggestions for testing and treatment were ignored. On those facts the Eighth Circuit reversed dismissal by the District Court which had found that the prisoner had merely disagreed with the course of treatment.

In White v. Kelsey, 935 F.2d 968 (8th Cir. 1991) the Eighth Circuit affirmed a District Court judgment in favor of a prisoner finding deliberate indifference where immediate treatment for a broken ankle was inadequate. The doctor set a broken ankle without anesthetic and without securing an x-ray to determine alignment.

In Fields v. Gander, 734 F.2d 1313 (8th Cir. 1984) a prisoner experienced dental pain. His treatment was delayed three weeks until payment was received. The Eighth Circuit reversed summary judgment in favor of the dentist.

In Toombs v. Bell, 798 F.2d 297 (8th Cir. 1986) a prisoner experienced pain and swelling beneath his ribs and was told at sick call that nothing was wrong. He, in fact, had developed gallstones which were treated after he passed out from the pain. Again, the Eighth Circuit reversed

The decision of the Panel, if allowed to stand, would constitute a radical departure from prior decisions by this Court and in the Circuits, in that it would exempt grossly negligent misdiagnosis utilizing easier and less efficacious treatment from the Eighth Amendment prohibition against cruel and unusual treatment. A new rule would be established that a grossly negligent diagnosis resulting in ineffectual treatment is outside of Eighth Amendment protection, as long as the treating physician expresses a belief that he or she is following a regular course of treatment. However, whether a reasonable

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the District Court dismissal noting, "This Court has reversed and remanded dismissals of prisoner's claims perhaps less grave then the one at issue. See, e.g. Mullen v. Smith, 738 F.2d 317 (8th Cir. 1984)(head injury untreated for four hours then valium given to prisoner); Cummings v. Roberts, 628 F.2d 1065 (8th Cir. 1980)(back injury untreated for three days)." Id. at 298.

or a cruel and unusual course of treatment has been utilized is a factual question. Moreover, to accept a physician's contested belief that he utilized reasonable care as dispositive on summary judgment clearly violates established standards of this Court.

B. **The Rendering Of Summary Judgement On Petitioner's Medical Malpractice Claim For Lack Of An Expert Affidavit Is A Radical Departure From Precedent, Requiring The Court's Supervision.**

Minnesota Statute §145.682, Subd. 2, generally requires that a Plaintiff in a malpractice action to furnish an Expert Affidavit, but only where "expert testimony is necessary to establish a prima facie case".

In its Order of May 14, 1993 (Appdx. p. 19), the Panel did not reference Eighth Circuit precedent which directly contradicts its affirmance of the District

Court. The Court cited for support a Minnesota case, Todd v. Eitel, 237 N.W.2d, 357 (Minn. 1975), which did not involve a negligent diagnosis.

The controlling case regarding expert affidavit requirements as to negligent diagnosis in the Eighth Circuit is Chizmadia v. Smiley's Point, 873 F.2d 1163 (8th Cir. 1989) which interpreted Minnesota law. Chizmadia involved the misdiagnosis of a detached retina. The Eighth Circuit held that a negligent diagnosis could be established within lay comprehension and accordingly, expert testimony was not necessary to prove a negligent misdiagnosis. [5]/

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[5]/ The Eighth Circuit, in Chizmadia, supra, at 1165, noted that misdiagnosis does not necessarily require expert testimony to establish a prima facie case. The Court quoted the controlling Minnesota case, Hestbeck v. Hennepin County, 297 Minn. 419, 424, 212 N.W.2d. 361, 364 (1973):

> Expert testimony is not necessary where the matters to be proved fall

within an area of common knowledge and developing lay comprehension of medical techniques and where the results of surgical or medical treatment viewed in the light of all the circumstances, provide a sufficient evidentiary basis to support an inference of negligence.

The grant of summary judgment in Chizmadia, by the District Court was found to be erroneous by the Eighth Circuit in that the lower Court did not make a full inquiry as to whether the alleged negligence of the Defendant doctor in failing to diagnose a detached retina fell within the area of common lay knowledge established in State and Minnesota cases:

> It is possible that the allegedly negligent failure to diagnose Chizmadia's detached retina falls within the area of common knowledge or lay comprehension. For example, Chizmadia's injury may have been obvious or recognizable to the degree that a negligent failure to diagnose can be demonstrated without expert testimony. Also, if the alleged malpractice does not fall within an area of common knowledge or lay comprehension, there are methods by which a plaintiff can show malpractice without securing his or her own expert to testify. For instance, Chizmadia might establish his case through his medical records, see Betzold v. Sherwin, 404 N.W.2d 286, 288 (Minn. Ct. App. 1987), with the aid of medical treatises, see Smith v. Knowles, 281 N.W. 2d at 656 n.4; Lutz v. Estate of Hillier, 574 F. Supp. 1032, 1034 (S.D. W. Va. 1983) (denying a motion for summary judgment in an action alleging negligent failure to diagnose where plaintiffs failed to provide their own expert witness). Because the district court did not

Chizmadia's eye condition, diagnosis and treatment history were significantly more complex as to appreciation by the general public than the facts related to the heart attack of Mr. Bellecourt. [6]/

Mr. Bellecourt, in contrast, was in the midst of an acute crisis. The symptoms of a "heart attack" were known to Mr. Bellecourt, who as a lay person made a correct diagnosis and so informed Dr. Wynne. The hospital facility was equipped and prepared for such an emergency. Mr.

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determine whether expert testimony was necessary in this case, we find that the order granting summary judgment was erroneous.

Chizmadia was treated over the course of two months by several doctors. No definitive diagnosis was made until it was discovered he had a detached retina. Surgery was unsuccessful resulting in blindness, the causation of which Chizmadia attributed to the delay in treatment.

Chizmadia, supra, at 1165.

[6]/ On remand, the District Court did not require expert testimony to establish a prima facie case. Chizmadia v. Smiley's Point Clinic, 726 F. Supp. 249, 252 (D. Minn. 1989).

Bellecourt's crisis was immediate. The Courts below did not appreciate that the public has a common understanding that EKG testing is appropriate when cardiac symptoms are reported.

The Courts below did not consider possible means of proof permitted by Minnesota law of Petitioner's malpractice claim in the absence of expert testimony. Rather, they erroneously concluded without discussion of Hestbeck, Betzold, or Smith, supra, as to the means of alternative proof available, that expert testimony was required. (Appdx. pp. 17-20; 84-93).

The affidavit submitted by Dr. Russell Leupker illustrated that proof of malpractice in this case is not complex.

> Medical intervention during the first few hours can limit or reverse damage. There exists a number of medical and surgical procedures that are available. Effective intervention can normally take place if accom-

> plished within the first three to four hours after the onset of chest pain. The failure to accomplish appropriate intervention during this interval is recognized to be harmful and risky to a patient. Thus, immediate medical care is viewed as necessary upon the onset of a myocardial infarction. Increased physical damage to the heart and arteries may increase the likelihood that a future episode will occur, and the likelihood that upon such occurrence an episode will be of greater severity.

(Appdx. p. 342).

Chizmadia, supra, was followed by the Eighth Circuit in Vakil v. Mayo Clinic, 878 F.2d 238 (8th Cir. 1989), wherein a Plaintiff, claimed malpractice as to her treatment for injuries sustained in an automobile accident. Vakil did not submit an Affidavit of Expert Review. The Defendant requested Summary Judgment for breach of Minn. Stat. §145.682. The Eighth Circuit, citing Chizmadia, supra, stated at p. 239,

> The applicability of this Minnesota Statute is conditioned upon a finding that expert testimony is necessary to establish a prima facie case of malpractice.

The Minnesota Courts have spoken to the same effect. [7]/

The District Court below found that expert testimony would be required to prove causation and damage to "provide

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[7]/ In Bauer v. Friedland, 394 N.W.2d 549 (Minn. App. 1986), the Minnesota Court of Appeals stated at p. 553:

> Minnesota has long recognized that in some cases liability may be established without expert testimony. Expert testimony is not necessary where the facts to be determined are within the common knowledge of the jury and where the results of the surgical or medical treatment, viewed in the light of all circumstances, provide a sufficient evidentiary basis to support an inference of negligence.

To the same effect, see Todd, supra; Christy v. Saliterman, 179 N.W. 2d 288 (1970); Muehlenbrok v. Park Davis and Co., 145 Minn. 100 176 N.W. 169 (1920).

Apart from expert opinion, if circumstantial evidence furnishes a reasonable basis for the inference that a doctor's negligence caused the injury, the case should be submitted to the jury. Miller v. Raaen, 139 N.W.2d 877 (Minn. 1966); and Jensen v. Linner, 260 Minn. 22, 108 N.W.2d 705 (1961).

some basis for the jury to quantify that injury". (Appdx. p. 92). The Court considered only the quantification of heart damage and not the pain and suffering experienced by Appellant during his night of terror while he was, in his view, being neglected and left to possibly die. Expert testimony to appreciate this pain is clearly not required. The District Court further failed to consider that causation and damage might be established through Appellee Wynne or through utilization of medical treatises.

In Lutz v. Hillier, 574 F.Supp. 1032 (1983), cited with approval in Chizmadia, supra, the proposed examination of Defendant's expert witnesses at trial was found sufficient to establish proof of standard of care, thereby permitting Plaintiff to survive a summary judgment motion as to his medical malpractice

claim. [8]/

In Betzold v. Sherwin, 404 N.W.2d 286 (Minn. App. 1987), cited in Chizmadia,

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[8]/ In Smith v. Knowles, supra, also cited in Chizmadia, supra, a Defendant doctor was cross-examined as to standard of care, and his testimony was corroborated by excerpts from several treatises. The Court concluded that the showing was sufficient to establish the prima facie element of standard of care. The Court cited as precedent Larson v. Belzer Clinic, 292 Minn. 30, 195 N.W.2d 416 (1972); and Anderson v. Florence, 288 Minn. 351, 181 N.W.2d 873 (1970). In Larson, the Court permitted adverse examination of the defendant doctor for expert testimony as to malpractice elements.

In Anderson, utilization of pretrial interrogatories eliciting the defendant's doctor's expert opinion as to the standard of care and defendant's deviation from such were permitted. The syllabus by the Minnesota Court at p. 874 states that

> "In malpractice actions, Rule 26.02 and 43.02 Rules of Civil Procedure governing the scope of trial discovery and cross examination of an adverse party, authorized the trial court to compel a defendant physician, when qualified as an expert, to answer pretrial interrogatories calling for his expert medical opinion."

Reinhardt v. Colton, 337 N.W. 2d 88 (1983) involved the diagnosis of rheumatoid arthritis and administration of the drug penicillamine, which had the side effect of causing anemia which was not explained to the patient at the time of the treatment. The Minnesota Supreme Court held that "a plaintiff in a malpractice action may establish his claim with expert testimony elicited solely from the defendant doctor." The testimony was found sufficient to establish the standard of care.

supra, medical records were found to be an essential aspect of proving causation as to the medical malpractice cause of action asserted by Plaintiff. In Pomani v. Underwood, 365 N.W.2d 286 (Minn. App. 1985), hospital rules were permitted to prove a prima facie case of medical malpractice as to the standard of care. As authority the Court cited Boland v. Garber, 257 N.W.2d 384 (Minn. 1977), wherein hospital rules were permitted as evidence of accepted practice in the medical community.

In Fowler v. Scheldrup, 166 Minn. 164, 207 N.W. 177 (1926) metal clips were unintentionally left in the patient after surgery. Such negligence, the Court found was within the scope of a lay jury without an expert's explanation. In Baer v. Chowning, 135 Minn. 453, 161 N.W. 144 (1917), a sponge was not removed during

surgery. The Court did not require expert testimony to explain the negligence. In Holt v. Ten Broek, 134 Minn. 458, 159 N.W. 1073 (1916), and in Jones v. Tri-State T.&T. Co., 118 Minn. 217, 136 N.W. 741 (1912), a burn resulted from the improper use of x-ray equipment.

The transcript of an interview of Dr. Wynne (Appdx. pp. 233-284), and Mr. Bellecourt's medical records (Appdx. pp. 192-232), are sufficient to establish a prima facie case capable of factual resolution at trial, even should other available evidence be seen as insufficient. [9]/

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[9]/ Assistant U.S. Attorney Lonnie Bryan questioned Dr. Wynne on October 30, 1989, in the presence of a Court Reporter. (Appdx. p. 233). Within Dr. Wynne's interview, the prima facie elements of Appellant's case are presented as to standard of care, deviation from this standard and causation. Dr. Wynne states, "as any internist knows, cardiac ischemia, most symptoms, can present in a whole lot of different ways ... the threshold or index of suspicion has to be low for looking at any symptom that might be heart pain ..." (Appdx. p. 258) Dr. Wynne further states, as to standard

of care and causation: "it is important that the patient is pain free because if the patient is still having any pain at all, and if it is heart pain, then there is a risk that the patient is having ongoing ischemia or lack of blood flow to the heart and potential heart damage from that." Further, "its just important that the patient is quick to let us know if there is any recurrence of chest pain." (Appdx. pp. 262-263)

Yet, Mr. Bellecourt reports that he was left in pain in his cell, afraid to seek further assistance. Dr. Wynne confirms that Mr. Bellecourt complained of chest pain and a possible heart attack (Appdx. p. 251). Accepting such facts as true, pursuant to the standard for summary judgment, one would find in Mr. Bellecourt's treatment a significant deviation from the standard of care outlined by Dr. Wynne.

As to the use of the electrocardiogram and causation. Dr. Wynne states, "if he had already started to infarct, which we later find out he did have heart problems, if he had already started to have damage to his to his heart then we could have seen some signs on the electrocardiogram." Dr. Wynne further presents a detailed explanation of the expected results gained by use of an electrocardiogram. (Appdx. pp. 273-275) When Dr. Wynne was asked whether heart damage might have been occurring during his visit with Mr. Bellecourt, as part of a so-called "silent heart attack", he answered candidly, "looking at all the data in retrospect, probably so ..." (Appdx. p. 281).

It may or may not be that Dr. Wynne believes that the medical attention he offered Mr. Bellecourt deviated from the standard of care common in the medical profession. His responses within his October 30, 1989 interview, however, are such that a prima facie case of such a departure, causing injury to Plaintiff is presented, upon which a jury could conclude that medical malpractice did indeed occur. (Appdx. p. 233).

In an Affidavit received by Plaintiff's

Contrary to Minnesota and Eighth Circuit precedent the Courts below did not consider whether testimony by Defendant doctor, utilization of learned texts or alternative means of proof might provide appropriate information capable of lay understanding. The District Court summarily concluded, that the Panel let stand, a finding that no such means could amount to sufficient proof. Such represents a radical departure from the controlling law.

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attorneys, an informant states that Appellee Lieutenant Friese told him institution policies were not followed in regard to Bellecourt's complaints. (Appdx. p. 328).

Medical records have been submitted showing that Mr. Bellecourt was admitted to St. Mary's Hospital and treated for a myocardial infarction. (Appdx. p. 192). These records together with Dr. Wynne's statement furnish evidence sufficient to demonstrate community standards. Further, other evidence through hospital rules, treatises, the individual Appellees or Appellee's witnesses are additionally available during discovery or at trial.

C. The Determination Below Regarding Presentment Of Petitioner's Federal Tort Claims Act Claim Is In Conflict With Supreme Court Precedent.

The District Court and the Eighth Circuit both declined to rule that the Bureau of Prisons received Mr. Bellecourt's Administrative Claim pursuant to the Federal Tort Claims Act. The holdings are in direct contradiction to a United States Supreme Court decision in Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417 (1932), in which the Court stated the rule of presumption of receipt upon mailing. Further, they depart from Eighth Circuit precedent as to burden of proof as to receipt. The District Court termed as speculative (Appdx. p. 40) Petitioner's proof which, according to precedent, is more then sufficient to prove receipt by a preponderance of the evidence.

The District Court insisted that the burden is "actual receipt", disregarding caselaw which confers a presumption of receipt upon proof of mailing. The District Court accepts the fact of mailing stating that Appellant has shown that such occurred ("Once you can show that you have mailed it - which I think you have done, and I don't think even Mr. Bryan disagrees with that") (Appdx. p. 411). However, without citing caselaw, the Court placed FTCA claims as being outside the normal rule concerning presumption of receipt of United States mail. In this the District Court erred, and the Eighth Circuit Panel erred in its affirmation. The District Court stated that the Petitioner must show "that Federal Medical Center actually received his administrative claim: Presumption of receipt is not sufficient to withstand the federal defendants'

motion to dismiss". (Appdx. p. 39).

In Hagner, supra, at 430, 431, the United States Supreme Court held "The rule is well settled that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed ...".

Petitioner submitted affidavits proving that the claim was properly mailed and thereby established a presumption of receipt. The District Court, indeed, specifically found the claim was mailed. (Appdx. p. 411). Mr. Bellecourt also submitted deposition evidence of Dr. Daniel Foster (Appdx. p. 351), and John Chreno (Appdx. p. 387), officials at the Federal Medical Center (FMC), Rochester, who testified they overheard discussions regarding the facts contained within the

written claim shortly after the mailing. The Federal Defendants, however, denied receipt. The District Court considered the flat denial of receipt as dispositive, rather than utilizing the appropriate presumptions and properly weighing the evidence of receipt.

A preponderance of evidence as to receipt is required to prove receipt. Legille v. Dann, 544 F.2d 1(D.C. Cir. 1976). Such corroborative evidence may be provided by various means such as by witnesses, by the failure of the mailing to be returned to its sender by the post office, by proof of prior mailing and by proof that the mailing was suspected. All of the above means of corroborative evidence were presented by Petitioner.

Deposition evidence shows that FMC official, Dr. Daniel Foster, had information indicative of FMC's receipt of

Appellant's claim. Dr. Foster, the Chief Psychologist at FMC, overheard a discussion concerning Appellant among several FMC Department Heads shortly after the claim was mailed. Dr. Foster overheard a conversation regarding Mr. Bellecourt's claim in which he learned "that Mr. Bellecourt was filing" and that "the lawsuit was anticipated". (Appdx. p. 363).

A second deponent, John Chreno, an executive assistant to the Warden at FMC remembered "general discussions about the claim at a Department Head meeting," which he attributed to a newspaper article. (Appdx. p. 390). Mr. Chreno stated that the discussions were among the executive group, but he did not remember precisely when in the fall of 1988 these took place. He also said he believed that the news report mentioned the filing of Mr.

Bellecourt's claim. An affidavit submitted by computer researcher Ray Howe, Director of Research Unlimited in Rochester, Minnesota (Appdx. p. 399) establishes, however, that no article on this subject appeared in any Minnesota daily newspaper between October 1988, and January 1989. Thus, it is likely that the discussion was occasioned by the receipt of the actual claim. Another deponent, Juli Alba relates that there was a general assumption in the institution in late 1988 that Mr. Bellecourt was going to file a legal action (Appdx. p. 346).

To establish a jurisdictionally adequate presentment of his claim, Appellant is required to show, by a preponderance of the evidence that his Administrative Claim was received. McNutt v. U.S., 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L. Ed. 1135 (1936); Zunamon v.

Brown, 418 F.2d 883 (8th Cir. 1969). In this effort he is entitled to rely upon the presumption of receipt upon mailing. Hagner, supra, and indirect evidence of receipt. [10]/

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[10]/ In United States v. Freeman, 402 F.Supp. 1080 (E.D. Wisc. 1975). The Plaintiff, showed that other similar mailings had been received at the Defendant's address by Defendant. Also, Defendant had not shown that the Order was not delivered by the Post Office or that it was returned to the sender unopened. Defendant's mere assertion of non-receipt, without more, was outweighed by the proof of mailing and of the circumstances indicating likely receipt.

In Hoffman v. U.S., 398 F.Supp 530 (1975), a claim was mailed to the FAA and CAB. The agencies denied that receipt was timely. The Court agreed with the Claimant that "there are all sorts of problems involved in relying on someone to stamp a claim in ...". Id. at 540. The Court found that the affidavits submitted by Defendants were insufficient to explain the events that may have occurred upon receipt and the Affiants did not speak from personal knowledge. The Court refused to deny that proper presentment had occurred.

In Solberg v. Secretary of Department of Health & Human Services, 583 F.Supp. 1095 (E.D. Wisc. 1984), the Plaintiff asserted she did not receive Government Notices that cancelled her disability payments. Her assertion, based on statements by herself and her father, was found insufficient to rebut the presumption of delivery given circumstantial evidence concerning the likelihood of receipt. The Government had made other effective mailings to her address and she had reason to expect that a new mailing would arrive.

In Re Longardner & Associates, Inc., 855 F.2d

Appellant's claim as placed in the United States mail was not returned to the sender. See, Supplemental Affidavits of Lynn Solberg (Appdx. p. 402) and Larry B. Leventhal (Appdx. p. 405). Under Longardner, supra, at 460 and Wells Fargo, supra, at 944 the fact that a mailing has not been returned to the sender is significant in proving that the postal item was, indeed, delivered.

In Wells Fargo Business v. Ben Kazloff, Inc., 695 F.2d 940 (1983), the Court found two points of importance as evidence of receipt. First, the sender had repeated the procedure used in a previous mailing that was received by the

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455 (7th Cir. 1988), the Seventh Circuit applied the presumption of receipt upon the showing of a proper mailing. It then stated that the addressee's "denial of receipt alone does not rebut the presumption, but merely creates a question of fact." Id. at 459. The addressee provided no further evidence and his denial was held insufficient to rebut the presumption. The presumption of mailing was strengthened by the fact that the letter was not returned to its sender by the Postal Service.

intended recipient. Second, the sender did not receive a return from the Post Office.

Further, FMC had previously received a mailing from the sender. (Ant. App. 178-179). It is unlikely that the second mailing was not delivered. Under Wells Fargo, supra, at 944, a previous mailing is significant in proving by circumstantial evidence the receipt of a subsequent mailing. Also, it was anticipated at FMC that a claim was to be filed by Appellant. (Appdx. pp. 300-302). Because of the correspondence and telephone contacts between FMC and the office of Appellant's counsel, FMC was not only on notice that the filing would soon be accomplished but FMC gave assistance towards that end. (Appdx. pp. 300-302). The expectation of an intended recipient that a mailing is soon to arrive is an important factor in

establishing proof of receipt, particularly where no inquiry is made as to non-arrival. Solberg, supra, at 1098.

The Court notes that deposition testimony "raises the inference that some FMC officials were aware of a potential or pending claim" (Appdx, p. 43). It was, however, unwilling to rule that receipt had occurred. However, under the reasoning of Longardner, Wells Fargo, Solberg and Hoffman, the Court should have found receipt based on the circumstances proven by Appellant. The District Court insisted that "actual receipt is the standard" (Appdx. p. 40) for filing of FTCA claims. However, no caselaw distinguishes FTCA claims as requiring a higher burden of proof than is the standard case.

The District Court and the Panel abandoned the Supreme Court presumption of

receipt and required an inappropriate burden of proof. In so doing the Courts failed to follow Supreme Court precedent.

CONCLUSION

This is a case of exceptional importance in which the District Court and the Eighth Circuit have significantly departed from Supreme Court and Circuit Court precedent as to several principles of law. The Court should grant certiorari to consider such conflict and to utilize the Courts supervisory powers to adjust for radical departure from established precedent.

Dated this 5th day of October, 1993.

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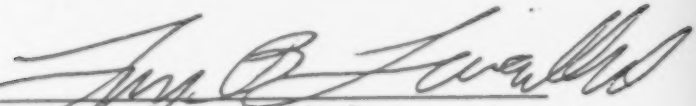
By: 
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CLYDE BELLECOURT,

Petitioner,

vs.

UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS, J. MICHAEL QUINLAN, THE FEDERAL MEDICAL CENTER, ROCHESTER, MINNESOTA, DR. MICHAEL TRUJILLO, CLIFF FRIESE, PETER CARLSON, DR. ALAN WYNNE, AND SARAH URRISTE,

Respondents,

APPENDIX TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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No. 92-1818

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CLYDE BELLECOURT,

Petitioner,

vs.

UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS, J. MICHAEL QUINLAN, THE FEDERAL MEDICAL CENTER, ROCHESTER, MINNESOTA, DR. MICHAEL TRUJILLO, CLIFF FRIESE, PETER CARLSON, DR. ALAN WYNNE, AND SARAH URRISTE,

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 92-1818/2002

Clyde H. Bellecourt,	*	
	*	
Appellant/	*	
Cross-appellee,	*	
	*	
v.	*	
	*	
United States of America; Federal Bureau of Prisons; J. Michael Quinlan, Director of Federal Prisons, Washington, D.C., in his official capacity; Federal Medical Center, Rochester, Minnesota, a division of the Federal Bureau of Prisons; Peter Carlson, Warden, Federal Medical Center, Rochester, Minnesota, in his official capacity; Dr. Michael Trujillo, Medical Director, Federal Medical Center, Rochester, Minnesota, in his	*	Appeals from the United States District Court for the District of Minnesota

official capacity; *
Cliff Friese, *
Lieutenant, Federal *
Medical Center, *
Rochester, Minnesota, *
in his official and *
individual capacities; *
Dr. Alan Wynne, *
Resident Physician, in *
his individual capacity *
and his official *
capacities as resident *
physician for Mayo *
Foundation and as an *
employee of the Federal *
Medical Center, *
Rochester, Minnesota; *
Sarah Urriste, *
Physicians' Assistant, *
in her individual *
capacity and in her *
official capacities as *
Physicians' Assistant *
for Mayo Foundation *
and as an employee of *
the Federal Medical *
Center, Rochester, *
Minnesota, *
*
Appellees/ *
Cross-appellants. *

Submitted: December 16, 1992

Filed: May 14, 1993

Before McMILLIAN, BOWMAN and LOKEN, Circuit Judges.

McMILLIAN, Circuit Judge.

Clyde H. Bellecourt appeals from an order entered in the United States District Court for the District of Minnesota[1] granting summary judgment to appellees in favor of the federal appellees[2] and appellee Dr. Alan Wynne on his civil rights claims and in favor of

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[1]The Honorable David S. Doty, United States District Judge for the District of Minnesota.

[2]The federal appellees were the United States, the Federal Bureau of Prisons, J.Michael Quinlan (the director of the Federal Bureau of Prisons), the Federal Medical Center at Rochester, Minnesota, and certain individual staff members at the Federal Medical Center at Rochester--medical director Dr. michael Trujillo, prison officer Cliff Friese, warden Peter Carlson, and physician's assistant Sarah Urriste.

Dr. Wynne on his state medical malpractice claim and dismissing his Federal Tort Claims Act (FTCA) claim. Bellecourt v. United States, No. 4-89-828, slip op. at 1 (D. Minn. Feb. 10, 1992) (Bellecourt). For reversal appellant argues the district court erred in (1) finding he did not properly present his FTCA claim to the appropriate federal agency, (2) finding the federal appellees and Dr. Wynne were not deliberately indifferent to his serious medical needs and the federal appellees did not discriminate against him o the basis of race or political affiliation in providing medical treatment or in making work assignments, and (3) finding he did not comply with certain state law requirements for filing a medical malpractice claim. For the

reasons discussed below, we affirm the order of the district court. Given our disposition of the appeal (No. 92-1818), we do not reach the merits of Dr. Wynne's self-styled cross-appeal (No. 92-2002) and accordingly dismiss that appeal as moot.

I.

Appellant, a former inmate of the Federal Medical Center at Rochester, Minnesota (FMC), serving a five-year term for distribution of LSD, on September 16, 1987, at about 12:30 a.m., complained of chest pains. Dr. Wynne, the doctor on duty, physically examined appellant and diagnosed him as having indigestion and gastritis. Dr. Wynne gave appellant an antacid and left after the antacid appeared to relieve appellant's pain, advising him to notify an officer if he

needed further attention. An officer checked on appellant very hour throughout the night and found appellant sleeping. Appellant did not request further medical assistance.

Appellant appeared for sick call the next morning where an EKG was run and blood was drawn. The EKG showed that a heart attack had occurred earlier that morning, but was not occurring while he was in the clinic. Appellant subsequently reported for a scheduled dental appointment in the outpatient clinic. Appellant filed suit September 18, 1989, against the federal appellees and Dr. Wynne, seeking damages for physical injury, emotional injury, pain and suffering, medical malpractice, and unlawful discrimination. Appellant

contended the collective acts and omissions of the federal appellees and Dr. Wynne constituted negligence, medical malpractice, and deliberate and wilful indifference to his health and safety resulting in the unnecessary and wanton infliction of physical injury, permanent heart damage, pain and suffering. Appellant also alleged a FTCA claim.

The district court granted the federal appellees' motion for dismissal of appellant's FTCA claim, granted the federal appellees' and Dr. Wynne's motions for summary judgment on appellant's civil rights claims, and granted Dr. Wynne's motion for summary judgment on appellant's medical malpractice claim. The district court found Dr. Wynne to be an independent contractor rather than a federal employee

and as such, the district court stated Dr. Wynne was not an appropriate party to the FTCA claim but was for the civil rights and medical malpractice claims. Bellecourt, slip op. at 6. The district court found appellant had not properly presented his FTCA claim because he did not prove his "request for administrative remedy" had been actually received. Id. at 9. Regarding appellant's civil rights claims, the district court found appellant did not prove deliberate indifference on behalf of the federal appellees or Dr. Wynne. Id. at 24. Appellant's state law medical malpractice claim was dismissed because he failed to satisfy the expert affidavit requirements of Minn. Stat. § 145.682 and because he did not demonstrate excusable neglect for not doing so. Id.

at 25-37. This appeal and cross-appeal followed.

II.

In reviewing the district court's grant of summary judgment for the federal appellees and Dr. Wynne, we examine the facts in the light most favorable to appellant. Our standard of review is de novo. Fed. R. Civ. P. 56(c); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); St. Paul Fire & Marine Ins. Co. v. Federal Deposit Ins. Corp., 968 F.2d 695, 699 (8th Cir. 1992); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992). With regard to the FTCA claim, the district court granted the federal appellees' motion to dismiss pursuant to

Fed. R. Civ. P. 12(b)(1), for lack of jurisdiction. Because jurisdiction is a threshold issue for the court, the district court has "broader power to decide its own right to hear the case than it has when the merits of the case are reached." Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). In the present case, the attack on jurisdiction was factual and this court must review the district court's findings under the clearly erroneous standard. Id. at 730.

Appellant first contends the district court erroneously dismissed his FTCA claim against the federal appellees for inadequate presentment because he failed to show the federal appellees actually received his administrative claim. Appellant argues the district court

improperly placed the burden of proving presentment on him and failed to follow the rule that a letter when placed in the mail is presumed to be delivered and received. The presumption of receipt can be rebutted by evidence of non-receipt, which appellant argues should have been required of the federal appellees.

The federal appellees argue that appellant failed to comply with jurisdictional requirements of the FTCA and did not use the appropriate forms for filing an administrative claim. The FTCA is a limited waiver of sovereign immunity which requires compliance with the conditions enacted by Congress. These conditions are construed narrowly and include the requirement that before filing an FTCA action the claimant "present" an

administrative claim requesting a sum certain in damages to the appropriate federal agency and that the claim be finally denied. 28 U.S.C. § 2675(a).

Presentment of an administrative claim is jurisdictional and must be pleaded and proven by the FTCA claimant. See, e.g., Bailey v. United States, 642 F.2d 344, 347 (9th Cir. 1981); Melo v. United States, 505 F.2d 1026, 1028-29 (8th Cir. 1974). In the present case it is undisputed that (1) appellant sent a "request for administrative remedy" to the associate warden at FMC; (2) appellant intended to comply with the FTCA despite the use of the incorrect form for a FTCA claim; (3) the "request for administrative remedy" was not mailed by certified mail; (4) the "request for administrative

remedy" was not received by the Federal Bureau of Prisons; and (50 the "request for administrative remedy," although prepared by counsel, did not request money damages.

The district court found that appellant failed to establish actual presentment and dismissed the FTCA claim against the federal appellees for lack of jurisdiction, Bellecourt, slip op. at 9; we hold the district court's finding was not clearly erroneous.

III.

Appellant next contends that the district court misapplied the standard for finding Fifth and Eighth Amendment violations and erred in finding the federal appellees and Dr. Wynne were not deliberately indifferent to his serious

medical needs and the federal appellees did not discriminate against him on the basis of race or political affiliation in providing medical treatment or in making work assignments. Id. at 17-24. Appellant argues the district court improperly assumed that the alleged instances of inattention to his medical needs amounted to professional decisions constituting proper treatment. Appellant contends the district court erred by not considering the combination of actions by the federal appellees and Dr. Wynne as constituting deliberate indifference. Appellant also alleges the federal appellees violated his due process and equal protection rights because he is a Native American and a known political activist who, even though he was over the

age of 50, was assigned to work in food service at FMC in violation of FMC policy. In addition, appellant claims medical treatment at FMC was administered in a discriminatory manner.

The federal appellees argue that the district court correctly found that appellant failed to provide specific proof of purposeful discrimination in the provision of medical treatment. They also contend appellant's conclusory allegation regarding his work assignment is inadequate to prevent entry of summary judgment and in any event appellant has no constitutional right to a particular work assignment in prison. The federal appellees also argue appellant failed to specifically allege prison officials conspired to deprive appellant of equal

protection of the laws as required by 42 U.S.C § 1985(3).

The district court found the record showed that the federal appellees and Dr. Wynne were not deliberately indifferent to appellant's serious medical needs. Bellecourt, slip op. at 23. We agree. The fact that Dr. Wynne misdiagnosed the appellant's condition, that his method of physical examination and treatment may not have followed community standards, or that he disagreed with appellant's suggested course of treatment does not amount to deliberate indifference in violation of the Eight Amendment. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990); Randall v. Wyrick, 642 F.2d 304, 308 (8th Cir. 1981). The district court also found that

beyond bare allegations of violations of his civil rights because appellant is a Native American and politically active, appellant provided no facts to support his claims of discrimination or conspiracy. We hold the district court did not err in granting summary judgment in favor of the federal appellees and Dr. Wynne on appellant's civil rights claims.

IV.

Appellant next argues the district court improperly dismissed his pendent state law medical malpractice claim against Dr. Wynne. The district court found that appellant did not present an expert affidavit within the time limits of Minn. Stat. § 145.682,[3] and failed to

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[3]The statute has two specific expert affidavit requirements--the first expert affidavit must accompany the service of

establish excusable neglect; therefore, the district court dismissed the claim with prejudice. Bellecourt, slip op. at 25-34. Appellant argues the state law does not require an expert affidavit if expert testimony is not necessary to establish liability, and that expert testimony was not needed in the present case because the symptoms and treatment for a heart attack are well known. See Miller v. Raaen, 139 N.W.2d 877, 880 (Minn. 1965) (summary of medical malpractice cases were expert testimony

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the medical malpractice summons and complaint, the second expert affidavit must be served within 180 days of the commencement of the lawsuit. Minn. Stat. § 145.682. The statute specifically informs litigants that unexcused noncompliance will lead to dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.

not needed to establish liability). Appellant further contends that his noncompliance can be remedied by extending the time to file an expert affidavit.

Dr. Wynne argues the district court correctly decided that appellant did not establish excusable neglect for his failure to timely file the required expert affidavits and that expert testimony was necessary for appellant to pursue this action. We agree. Appellant's claim that Dr. Wynne failed to properly diagnose his heart attack is not the kind of case where the alleged negligence "speaks for itself" without expert medical opinion. See Todd v. Eitel Hospital, 237 N.W.2d 357, 361 (Minn. 1975) (Distinguishing failure to properly diagnose malignancy, which would require expert testimony, from having a

sponge inside body following surgery, which would not). We hold the district court did not err in dismissing appellant's medical malpractice claim with prejudice.

V.

Appellant also argues that the federal appellees and Dr. Wynne violated the requirements of Minn. Stat. § 144.651, the state medical "bill of rights." He argues summary judgment was not appropriate because genuine issues of material fact existed. The district court found that summary judgment was warranted because, beyond a general allegation that the federal appellees and Dr. Wynne had violated this statute, appellant neither stated which provision of the statute was violated nor provided any specific facts

supporting his allegations. Bellecourt, slip op. at 25. We agree that appellant did not establish sufficient facts to raise a genuine issue for trial, and hold the district court did not err in granting summary judgment in favor of the federal appellees and Dr. Wynne.

Accordingly, we affirm the order of the district court dismissing appellant's FTCA claims, and granting summary judgment on appellant's other claims. Given our disposition of the appeal (no. 92-1818), we do not reach the merits of Dr. Wynne's self-styled cross-appeal (No. 92-2002) and dismiss that appeal as moot.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-1818MNMI

Clyde H. Bellecourt,	*
	*
Appellant,	* Order Denying
	* Petition for
vs.	* Rehearing and
	* Suggestion for
United States of America,	* Rehearing En
	* Banc
	*
Appellees.	*

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

July 19, 1993

Order Entered at the Direction of the Court:

/ S /

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Clyde H. Bellecourt, Civil No. 4-89-828

Plaintiff,

v. ORDER

United States of America, et al.,

Defendants.

Larry B. Leventhal, Esq., Suite 420 Sexton Building, 529 South Seventh Street, Minneapolis, MN 55415 and Douglas Hall, Legal Rights Center, 808 Franklin Avenue East, Minneapolis, MN 55404, counsel for plaintiff.

Thomas Heffelfinger, United States Attorney and Lonnie F. Bryan, Assistant United States Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, counsel for federal defendant.

Leo G. Stern, Esq., Laurie J. Miller, Esq. and Fredrikson & Byron, P.A. 1100 International Centre, 900 Second Avenue South, Minneapolis, MN 55402, counsel for defendant Wynne.

This matter is before the court on the federal defendants' motion for dismissal or, in the alternative, for summary judgment and on defendant Wynne's motion for partial summary judgment. Based on the files, records and proceeding herein, the federal defendants' motion for dismissal on plaintiff's federal tort claim will be granted, the federal defendants' motion for summary judgment on plaintiff's other claims against the federal defendants will be granted and defendant Wynne's motion for summary judgment will be granted.

BACKGROUND

Plaintiff Clyde H. Bellecourt asserts causes of action for negligence, medical malpractice, violation of due process, cruel and unusual punishment, civil rights

violations under 42 U.S.C. § 1981 and 42 U.S.C. § 1985(c), statutory violations, and violation of various duties owed to him. Those causes of action stem from two alleged incidents of mistreatment plaintiff claims occurred while he was incarcerated in the Federal Medical Center in Rochester, Minnesota ("FMC") in 1987. First, plaintiff, who is over fifty years old, claims that he was assigned to work in the FMC kitchen in contravention of a prison policy that states that persons over fifty are not required to work in the kitchen. Second, plaintiff claims that he suffered a heart attack on September 16, 1987, and that prison officials and the physician at FMC deliberately ignored his requests for treatment of his painful ailment.

Defendant Dr. Wynne moves for summary judgment on all claims of medical malpractice against him on the grounds that plaintiff failed to submit timely affidavits of expert review as required by Minn. Stat. § 145.682. The federal defendants move for dismissal on various grounds or, in the alternative, for summary judgment on all claims against them.

The court heard oral arguments on those motions on March 1, 1991. On March 6, 1991, the court issued a preliminary order regarding plaintiff's negligence claims against the government.[1] The court ruled that before it could consider defendants' motions as they applied to the

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[1]See Bellecourt v. United States, No. 4-89-828 (D. Minn. Mar. 6, 1991).

merits of plaintiff's claims, the court had to decide the threshold jurisdictional issue of whether plaintiff properly presented his negligence claims to the appropriate federal agency, as required by the Federal Tort Claim Act ("FTCA"). The FTCA requires that a plaintiff satisfy the presentment requirement before the court may exercise jurisdiction over the claim.[2]

---

[2]28 U.S.C. § 2675(a) provides in pertinent part that:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or

See Melo v. United States, 505 F.2d 1026, 1028-29 (8th Cir. 1974). The presentment requirement is satisfied only when the appropriate federal agency actually receives the claim.[3]

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registered mail.

[3]28 C.F.R. § 14.2(a) entitled "Administrative Claim; When Presented" supplements 28 U.S.C. § 2675(a) and provides in pertinent part:

> For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal Agency receives from the claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident....

See also Drazan v. United States, 762 F.2d 56, 58 (7th Cir. 1985) (citing 28 C.F.R. § 14.2(a); 28 C.F.R. § 14.604(b)) (finding that for purposes of the Federal Torts Claims Act, "mailing is not presenting; there must be receipt."); Murray v. United States, 604 F. Supp. 444 (E.D. Pa. 1985) (same); Barlow v. Avco Corp., 527 F. Supp. 269, 273 (E.D. Va. 1981) (same).

That discovery has not been completed.

DISCUSSION

Status of Defendant Dr. Wynne

As a preliminary matter, the court must determine whether Dr. Wynne is a federal or private sector employee. The United States Attorney's office originally represented defendant Dr. Wynne because the Department of Justice and the Bureau of Prisons considered him a federal employee. In August, 1990, the Department of Justice reversed its position and determined that Dr. Wynne was an

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limiting the length of briefs submitted in this case, the court finds that plaintiff's latest submission constitutes a flagrant violation of the court's previous order requesting a memorandum solely on the issue of presentment. Accordingly, the court will consider only that portion of plaintiff's September 4, 1991, memorandum of law that discusses the issue of presentment.

independent contractor with FMC. Thereafter, Dr. Wynne retained private counsel to represent him in this matter. On May 30, 1991, the federal defendants moved the court to amend its answer in order that it might reflect that Dr. Wynne was an independent contractor and that he was represented by private counsel. Dr. Wynne did not file an objection to the government's motion and plaintiff had no objection to the government's motion.

The contract between Dr. Wynne and the Bureau of Prisons repeatedly describes Dr. Wynne as a contractor. The contract states that Dr. Wynne's position with FMC "is ... contractual and not an appointment.... Contractor shall not be subject to government supervision." Exhibit C to federal defendant's motion to

dismiss or, in the alternative for summary judgment at 1. The contract further specifies that the "[g]overnment will not withhold any taxes an the contractor is not entitled to any fringe benefits." Id. Other documents submitted with the federal defendants' motions also allude to the contractual nature of Dr. Wynne's employment with FMC. The court finds that Dr. Wynne was an independent contractor with FMC at the time of the alleged malpractice and grants the federal defendants' May 30, 1991, motion to amend their answer to reflect Dr. Wynne's independent contractor status. Because Dr. Wynne was an independent contractor at the time of the alleged malpractice, the court concludes that Dr. Wynne is not an appropriate party to plaintiff's federal

attributable to the State, and that ... [the doctor] acted under color of state law for purposes of § 1983. Id. at 57.

> "The fact that the State employed respondent pursuant to a contractual arrangement that did not generate the same benefits or obligations applicable to other 'state employees' does not alter the analysis. It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State.... Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."

Id. at 55-56. The holding in West is instructive to the determination to be made in the case at hand because a Bivens claim is analogous to a § 1983 claim. "The effect of Bivens was, in essence, to

create a remedy against federal officers, acting under color of federal law, that was analogous, to the § 1983 action against state officials." Dean v. Gladney, 621 F.2d 1331, 1336 (5th Cir. 1980); see also Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1337-38 (9th Cir. 1987) (finding that the private status of a defendant will not serve to defeat a Bivens claim for violation of constitutional rights provided that defendant engaged in federal action). Therefore, the court concludes that Dr. Wynne is an appropriate party to plaintiff's Bivens claims.

Presentment of the Administrative Claim

Whether plaintiff properly presented his administrative claim is a jurisdictional issue. The federal

defendants move the court for an order dismissing plaintiff's federal tort action pursuant to Fed. R. Civ. P. 12(b) (1). Rule 12(b) (1) "[j]urisdictional issues, whether they involve questions of law or of fact, are for the courts to decide." Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). The court may consider matters outside the pleadings in a challenge to subject matter jurisdiction. Id. at 728 n.4 (citations omitted).

Plaintiff continues to allege that he properly presented an administrative claim under 28 U.S.C. § 2675(a). First, plaintiff alleges a presumption of receipt. Plaintiff submitted affidavits stating this his claim was mailed to the FMC. Second, plaintiff claims that deposition testimony indicates that FMC

received plaintiff's administrative claim, thereby supporting the presumption of receipt and satisfying plaintiff's burden of establishing presentment. Plaintiff alleges that the depositions of Dr. Daniel Foster, Chief Psychologist at FMC, and John Chreno, coordinator of social services at FMC when plaintiff had his hart attack, provide sufficient evidence that FMC received plaintiff's claim. Plaintiff cites a portion of Dr. Foster's deposition in which the doctor states that he overheard a conversation regarding plaintiff's claim shortly after plaintiff allegedly mailed the claim. Plaintiff also cites a portion of Chreno's deposition in which he states that he remembered a discussion about the claim at a department head meeting. Chreno

attributed that discussion to a newspaper article. Plaintiff also submitted the affidavit of Ray Howe, Director of Research Unlimited in Rochester, Minnesota, in which Howe states that no Minnesota daily newspaper carried an article on plaintiff's lawsuit between October 1988 and January 1989. Based on that evidence, plaintiff claims that FMC officials must have received plaintiff's administrative claim.

The court finds that plaintiff has not satisfied his burden of showing that FMC actually received his administrative claim. Presumption of receipt is not sufficient to withstand the federal defendants' motion to dismiss. Plaintiff must show that FMC actually received his claim and the deposition testimony that

plaintiff relies on to establish presentment is too speculative to prove that FMC actually received his claim.

Plaintiff draws his inference of receipt from the following portions of Dr. Foster's and John Chreno's testimony:

Dr. Foster

Q. I want to focus on this conversation you overhead for a couple of seconds, okay?

A. Yes.

Q. As I understand it one, you cannot tell us who made the statement?

A. That's correct.

Q. Okay. You cannot tell us who was present when the statement was made, is that correct?

A. That's correct.

Q. You cannot tell us with any precision when the statement was made, is that correct?

A. That's correct.

***

Q. Okay. And it is your -- Do I also understand that it is your characterization of the conversation, that it did not reference any formal complaint or written claim having been received on that subject?

A. My characterization or my recall, vague as it is, was to anticipate a lawsuit. It certainly was not clear whether there was anything formal written or it was just something verbalized. It was a speculative type of comment, from my perspective. I didn't know it was a fact or had substance to it.

Q. Okay. One of the things I am trying to get at with the question is, in the Federal Tort Claim Procedures, as you may know, one of the steps that a person has to follow to get into court is to have filed a formal written administrative claim with FMC Rochester prior to filing the lawsuit. Okay. Can your characterization of the conversation that you overheard, okay, was it your understanding that any formal written administrative claim had been

received at FMC Rochester at that time?

A. I have no recollection of such a statement or of reference to such a filing.

***

A. I couldn't say it's likely. I could say it's possible. I don't know. I was not -- I did not hear mention of a written claim.

Foster Dep. at 12, 16-18.

John Chreno

Q. And do you recall any discussion in that period in 1988 in the executive group regarding Mr. Bellecourt and the heart attack situation?

A. I don't have any specific independent recollection of that. Other than I recall that there were -- I do remember being involved in general discussions about the claim when the newspaper article came out. But again, I don't know exactly when that came out.

***

> Q. (Mr. Hall) In October, November or December of 1988, was there a discussion in the executive group about a BP-9 submitted by Clyde Bellecourt concerning a heart attack?
>
> A. Not that I can recall.

Chreno Dep. at 12-13. Although the deposition testimony raises the inference that some FMC officials were aware of a potential or pending claim against defendants, the deposition testimony does not provide sufficient evidence from which the court can determine that FMC actually received plaintiff's claim.

The federal defendants submitted additional deposition testimony on the mail receipt procedure that supports the court's finding. FMC receives its mail in a central mail room. Mail room employees sort the mail into departments and department employees pick up the mail.

Logs are kept for legal and certified mail, but not for ordinary mail. Because plaintiff sent his alleged claim through ordinary mail, mail room employees would not have recorded receipt of plaintiff's claim.

Plaintiff addressed his claim to Associate Warden Olson. If FMC had received the claim, the associate warden's secretary would have picked up his mail from the mail room, taken the mail to the associate warden's office and opened and reviewed the mail before passing it on to the associate warden. The associate warden's secretary at the time plaintiff allegedly sent his claim, Kathy Leighton, testified that she did not see the letter until it was shown to her shortly before her deposition.

Associate Warden Olson testified that the claim would have come to his attention because it was addressed to him. However, Olson testified that he did not see the claim until it was shown to him shortly before his deposition. Likewise, Timothy Ondahl, who was acting associate warden between December 5 and 19, 1988, while Warden Olson was away from FMC, testified that he would have read mail addressed to Warden Olson during his absence. Mr. Ondahl testified that he did not see the claim until it was shown to him a few weeks before his deposition.

Plaintiff's claim is a BP-9 Request for Administrative Remedy ("BP-9") which is used for inmate grievances occurring during an applicant's imprisonment. When a BP-9 is received, the associate warden's

secretary gives it to the case management coordinator. If the case management coordinator determines that utilization of a BP-9 is the proper remedy for the relief requested, the associate warden's secretary notes the receipt of the BP-9 in a log book. The log contains the administrative case number, the name of the inmate, the assignment to prison staff and a brief description of the claim.

When the case management coordinator determines that a BP-9 is an improper request, receipt of the BP-9 is not marked in the log book. Instead, the case management coordinator prepares a memorandum rejecting the BP-9. The BP-9 is then returned to the applicant with a copy of the memorandum. The case

management coordinator also keeps a copy of the memoranda rejecting the BP-9.

At the time plaintiff allegedly filed his administrative claim plaintiff was not an inmate. Consequently, filing a BP-9 was not the appropriate method by which plaintiff should have filed his claim. Therefore, the case management coordinator would have prepared a memorandum rejecting the BP-9. Julie Alba, the case management coordinator at the time of the alleged filing, testified that she did not prepare a memorandum rejecting plaintiff's claim. She further testified that, given the nature of plaintiff's allegations, his claim would have been forwarded to her and she would have remembered it. Alba testified that she did not see plaintiff's

alleged claim until shortly before her deposition.

Plaintiff argues that the BP-9 should have been construed as a valid notification of a claim under the FTCA. Assuming that an FMC employee would have treated plaintiff's claim as a claim arising under the FTCA, receipt of the claim would have been forwarded to FMC's attorney advisor for analysis. Daryl Kosiak, FMC's attorney advisor at the time plaintiff allegedly mailed his claim, testified that he did not see plaintiff's alleged claim until it was shown to him after initiation of this lawsuit. Accordingly, the court finds that plaintiff has failed to satisfy his burden of establishing actual presentment and plaintiff's negligence claim against

federal defendants is dismissed pursuant to Fed. R. Civ. P. 12(b) (1).

Other Claims Against Federal Defendants

The court also dismisses plaintiff's eighth, ninth, and tenth counts in which plaintiff alleges that J. Michael Quinlan, Director of Federal Bureau of Prisons, Peter Carlson, Director of FMC, and Dr. Michael Trujillo, Medical Director of FMC, violated various duties owed to plaintiff. Plaintiff proffers no evidence to support those claims and the court holds that those claims fail to state a claim upon which relief may be granted. The court grants summary judgment on those claims pursuant to Fed. R. Civ. P. 56(c).

Constitutional Claims

The federal defendants move to dismiss plaintiff's constitutional claims

pursuant to Fed. R. Civ. P. 12(b) (6) or, in the alternative, for summary judgment on those claims. On a motion to dismiss, the "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-56 (1957)). Defendants have submitted additional documents with its motion. Because the court relies on those additional documents in making its determination, defendant's motion will be treated as a motion for summary judgment. See Fed. R. Civ. P. 12(b) (6) & 56.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary

judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Stated in the negative, summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 248. In order

for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Fed. R. Civ. P. 56(c). A fact is material only when its resolution affects the outcome of the case. Anderson, 477 U.S. at 248. On a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. Id. at 250. The nonmoving party, however, may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. Celotex, 477 U.S. at 324. Moreover, if a plaintiff cannot support

each essential element of its claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. Id. at 322-23. With this standard at hand, the court will consider federal defendants' motion.[6]

As his third and fourth causes of action, plaintiff alleges a violation of his fifth and eight amendment rights. See Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff alleges that because he is Native American, defendants failed to fairly apply the laws and regulations governing his incarceration, violating his fifth amendment rights. Plaintiff further alleges that defendants' actions

[6]This summary judgment standard also applies to defendant Dr. Wynne's motion for partial summary judgment.

individually and in concert constituted cruel and unusual punishment in violation of his eighth amendment rights.

A plaintiff whose clearly established constitutional rights are violated by federal officials may sue them directly, even though no legislation by Congress exists specifically authorizing such a remedy. See Bivens, 403 U.S. at 396-97; Arcoren v. Peters, 811 F.2d 392, 393 (8th Cir. 1987). Caution is observed in granting a Bivens remedy. Arcoren, 811 F.2d at 393. Courts should hesitate when factors, such as the existence of another equally effective remedy, exist. Id. (citing Bivens, 403 U.S. at 397). "A Bivens action must be founded upon disregard of requirements established by the Constitution. Mere ultra vires action

in excess of the officer's lawful authority does not suffice." Id. at 393-94 (citing Bivens, 403 U.S. at 396-97). Erroneous decisions do not provide a basis for a Bivens action. Id. at 394 (citations omitted).

A. Fifth Amendment

Beyond bare allegations of race discrimination, plaintiff has failed to allege any other facts supporting his claim. In a recent case regarding constitutional claims brought under 42 U.S.C. § 1983, Chief Judge Alsop warned plaintiffs that constitutional claims "should not be pled in ... [a] shotgun manner." Liggins v. Morris, 749 F. Supp. 967, 971 (D. Minn. 1990).

> Almost invariably, complaints using this format are met with motions to dismiss or for summary judgment .... It is

> left to the court to divine what discrete constitutional violations are in fact legitimate and proper ... as against each defendant. The court must and does ferret out and dismiss those alleged constitutional violations that patently cannot be maintained. The process is time consuming, fraught with frustrations for both the court and counsel, and disrupts the orderly processing of legitimate claims.... The time has come for practitioners in this district to prepare complaints alleging [constitutional] violations ... in a fashion that will identify the specific constitutional violations as against only culpable defendants. This court is no longer disposed to perform what should be the responsibility of diligent counsel in that regard.

Id. at 971. The court finds that admonition equally apropos to a Bivens claim. Plaintiff's assertion that he will fill in the details of his complaint with additional discovery is inappropriate and insufficient to withstand defendant's

motion. Accordingly, because defendant has failed to withstand defendant's motion. Accordingly, because defendant has failed to provide facts that sufficiently demonstrate discriminatory treatment, defendants' motion for summary judgment on plaintiff's fifth amendment claim is granted.

B. Eighth Amendment

Plaintiff's eighth amendment claim also suffers from a vague factual predicate. However, because of the serious allegations of alleged indifference to plaintiff's medical needs, and because the court has plaintiff's medical records and other documents before it, the court will attempt to ferret out plaintiff's claim.

Prison employees violate a prisoner's eighth amendment right to be free from cruel and unusual punishment if they are deliberately indifferent to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Smith v. Jenkins, 919 F.2d 90, 92-94 (8th Cir. 1990). "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once proscribed." Estelle, 429 U.S. at 104-05 (footnotes omitted).

1. **Supervisory Personnel: Director of Federal Bureau of Prisons, J. Michael Quinlan, Warden of FMC, Peter Carlson, Medical Director of FMC, Dr. Michael Trujillo**

In a Bivens action, a federal official cannot be held vicariously liable for the acts of his subordinates under the doctrine of respondeat superior, unless he was personally involved in or participated in the unconstitutional acts. Rizzo v. Goode, 423 U.S. 362, 371, 376-377 (1976); Tallman v. Regan, 846 F.2d 494, 495 (8th Cir. 1988). Unless plaintiff pleads an "affirmative link" between the supervisor's "personal participation, his exercise of control or direction, or his failure to supervise," dismissal is appropriate. McKay v. Hammock, 730 F.2d 1367, 1374 (10th Cir. 1984). Beyond bare allegations, plaintiff has not alleged

facts linking the supervisory personnel to the alleged unconstitutional acts. Neither has plaintiff produced evidence that the supervisory personnel maintained discriminatory policies, failed to provide adequate instruction or failed to supervise in a fashion that could link them to a deprivation of constitutional rights. Accordingly, the court finds that summary judgment is appropriate for J. Michael Quinlan, Peter Carlson and Dr. Trujillo on plaintiff's eighth amendment claim.

2. **Lieutenant Cliff Friese**

Plaintiff admits that Lieutenant Friese, along with several other guards, responded to his call for help and that defendant Friese radioed for medical assistance after plaintiff said he was in

pain. Plaintiff contends that during his examination he repeatedly told the doctor that his condition was serious, and that in response, defendant Friese warned plaintiff that he "should be quiet and not make trouble, or else ... [he] would risk being sent to the 'hole'". Plaintiff further contends that Dr. Wynne told plaintiff to contact him if he had a reoccurrence of pain during the night and that Lieutenant Friese failed to check on his condition during the night and that Lieutenant Friese failed to check on his condition during the night to determine if he needed further assistance.

The court finds that plaintiff does not have a valid eighth amendment claim against Lieutenant Friese. Plaintiff has not alleged sufficient facts indicating

that Lieutenant Friese "intentionally denied or delayed" plaintiff's access to medical care. First, plaintiff admits that defendant Friese immediately responded to his call for assistance and shortly thereafter obtained medical care for plaintiff. Second, although Lieutenant Friese himself may not have checked on plaintiff during the night, documents submitted to the court indicate that other prison guards did check plaintiff's status during the course of the night. See Exhibit L to federal defendant's Motion to Dismiss or for Summary Judgment. Third, plaintiff has not provided the court with sufficient evidence indicating that he attempted to obtain additional medical care and was deliberately denied that care.

Plaintiff stated that he "stayed awake in continuous pain throughout most of the night and considered calling for the doctor but did not do so because he thought the doctor would not listen to him." Plaintiff also claims that he did not call for the doctor because Lieutenant Friese "had told him [during Dr. Wynne's examination] not to make a disturbance and [p]laintiff believed that if he did call for a guard again, that he might be placed in solitary confinement without access to medical personnel." Plaintiff's Memorandum in Opposition at 3. Even assuming that plaintiff believed as he did, plaintiff's subjective determination that further requests for assistance would be ignored or cause him to be placed in solitary confinement is not sufficient to

support his claim. Lieutenant Friese had no reason to believe that plaintiff required additional assistance after the doctor's examination and treatment, and "deliberately denied" him nothing. Therefore, plaintiff's eighth amendment claim against Lieutenant Friese fails.

3. **Medical Personnel: Physician Assistant Urriste and Dr. Wynne**

The eighth amendment is violated if medical care is so grossly incompetent or inadequate that it amounts to deliberate indifference. Smith, 919 F.2d at 93 (citations omitted). A doctor's decision to take an easier or less efficacious course of treatment, refusal to provide essential care, or care so inappropriate as to evidence intentional maltreatment violates the eighth amendment. Id. However, the indifference to medical needs

must be substantial. Mere negligence, inadvertent failure to provide adequate medical care and gross negligence do not support a claim of medical mistreatment under the eighth amendment. Estelle, 429 U.S. at 106. Likewise, a difference of opinion between an inmate and prison medical personnel regarding appropriate medical treatment does not suffice, Randall v. Wyrick, 642 F.2d 304, 308 (8th Cir. 1981), neither does a delay in providing medical treatment unless the delay causes substantial harm. Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

a. Physician Assistant Urriste

Plaintiff claims that he reported to sick call at 7:20 a.m. on September 16, 1987, told Physician's Assistant Urriste

that he was having chest pains and that she told him to wait in the waiting room and that someone would like at him immediately. Plaintiff contends that he was not examined until 9:15 a.m., and that this delay in treatment constitutes a violation of his eighth amendment rights.

The court finds, however, that the medical records submitted by the federal defendants indicate that plaintiff received some medical care between 7:20 a.m. and 9:15 a.m. on September 16, 1987. An electrocardiogram ("EKG") printout shows that an EKG was taken at 7:48 a.m. on September 16, 1987. Another medical document indicates that a blood test was performed at 8:10 a.m. Accordingly, the court finds that plaintiff has not shown

that defendant Urriste was deliberately indifferent to plaintiff's medical needs.

b. **Dr. Wynne**

Plaintiff asserts that Dr. Wynne's examination so greatly deviated from the medical norm that it constituted an eighth amendment violation. In support of that contention, plaintiff submitted an affidavit of expert review. The expert stated that Dr. Wynne deviated from the normal standard of care in attending to plaintiff's reported condition. See Affidavit of Identification of Expert at 3. The expert stated that reports of pressure and pain in the chest area and shortness of breath should have led an examining physician to suspect a heart attack. Id. According to the expert, given the potential danger to both life

and vital organs posed by a heart attack, the normal standard of medical care dictates precautions, such as hospitalization and an EKG to determine if a heart attack was occurring. Plaintiff also asserts that he told Dr. Wynne that he was having a heart attack and needed hospitalization and an EKG.

The court finds that Dr. Wynne did not violate defendant's eighth amendment rights. The facts indicate that Dr. Wynne arrived at defendant's cell within a reasonable time after receiving word that plaintiff was having chest pains. Medical records indicate that Dr. Wynne thoroughly examined plaintiff and from his examination determined that plaintiff likely was suffering from severe indigestion. Dr. Wynne gave plaintiff

antacid and observed that plaintiff's pain seemed to subside. Therefore, Dr. Wynne believed that a heart attack was not the cause of plaintiff's pain and determined that an EKG was unnecessary at that time. Dr. Wynne did make a notation in his medical notes that he would get an EKG of plaintiff if he continued to experience chest pain. The fact that Dr. Wynne misdiagnosed the source of plaintiff's pain, that his method of examination and treatment may not have followed community standards, or that he disagreed with plaintiff's suggested course of treatment does not amount to an eighth amendment violation. Estelle, 429 U.S. at 106. Accordingly, the court finds that Dr. Wynne's exercise of medical judgment was not deliberately indifferent to

plaintiff's medical needs and that plaintiff's eighth amendment claim with respect to Dr. Wynne is denied.

Civil Rights Claims

As his fifth and sixth causes of action, plaintiff asserts violations of his civil rights pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 1985(c). Plaintiff contends that because of their racial animus, defendants treated him differently than other prisoners through failure to provide reasonable, competent, and standard medical care, in violation of § 1981. Plaintiff also contends that defendants conspired to violate his civil rights, in violation of § 1985(c).

As with his Bivens claim alleging violation of his fifth amendment rights, plaintiff must allege sufficient facts

indicating defendants actions were motivated by discriminatory animus to survive federal defendants' motion for summary judgment on the alleged civil rights violations. See Runyon v. McCrary, 427 U.S. 160 (1976). In addition, for his § 1985(c) claim to survive federal defendants' motion for summary judgment, plaintiff must also allege sufficient facts that shows defendants reached an agreement and directed themselves toward an unconstitutional action by virtue of mutual understanding. See City of Omaha Employees Betterment Assoc. v. City of Omaha, 883 F.2d 650, 652 (8th Cir. 1989).

Beyond bare allegations of a conspiracy to violate his civil rights because he is Native American, plaintiff has provided no facts of racial animus or

a conspiracy to act because of racial animus. Accordingly, federal defendants' motion for summary judgment on plaintiff's civil rights claims is granted.

Statutory Claim: Patient's Bill of Rights

Plaintiff's seventh cause of action alleges a violation of Minn. Stat. 144.651, a medical "Bill of Rights" for patients. Beyond a general allegation that defendants violated this statute, plaintiff did not state which provision of the statute was violated or provide any facts supporting his allegations. Because plaintiff has not set forth sufficient facts to raise a genuine issue for trial, summary judgment is appropriate on this statutory cause of action.

Medical Malpractice Claim

As a preliminary matter, the government contends that the court should decline to exercise jurisdiction over plaintiff's state law medical malpractice claim against defendant Dr. Wynne. Under Eighth Circuit law, the decision to dismiss plaintiff's pendent state law claims is discretionary. See e.g. Curtis v. Sears, Roebuck & Co., 754 F.2d 781, 785 (8th Cir. 1985). The court has determined that it will exercise jurisdiction over plaintiff's medical malpractice claim. If jurisdiction is not examined, plaintiff's state law claim may be barred by the Minnesota statute of limitations. Significant delay in this case has already occurred as it is approximately two and one-half years old. Deciding this issue

also favors judicial economy because there has been a significant investment of judicial time and resources, and the court is familiar with the complex fact issues involved.

Dr. Wynne contends that summary judgment on plaintiff's medical malpractice claim is appropriate because (1) plaintiff did not timely file two affidavits that are necessary to sustain a medical malpractice claim under Minn. Stat. § 145.682, thereby warranting dismissal, (2) this is the type of case where expert testimony is necessary to establish liability, and therefore, plaintiff may not avail himself of an exception to § 145.682 excusing compliance with the affidavit requirement when expert testimony is not necessary to prove

liability, and (3) plaintiff cannot establish excusable neglect for the late filing of expert affidavits. Plaintiff contends that he did not have to comply with Minn. Stat. § 145.682 because (1) this is the type of case where expert testimony is not necessary to establish liability, and (2) even if the court determines that expert testimony is necessary to establish liability, plaintiff filed an expert affidavit and filed it late because of excusable neglect.

Minn. Stat. § 145.682 requires a plaintiff bringing a medical malpractice claim to submit two affidavits supporting the claim. The first affidavit ("expert review affidavit") must be submitted with the complaint and state that before

commencing the lawsuit, plaintiff's attorney reviewed the facts of the case with a medical expert who believed that at least one defendant named in the suit deviated from the applicable standard of care and thereby injured the plaintiff. Minn. Stat. § 145.682, subd. 3(a). In lieu of submitting the affidavit, plaintiff's attorney may state that the required expert review could not be obtained in time to file the suit within the statute of limitations. Id., subd. 3(b). If the latter option is selected, plaintiff's attorney, within 90 days of filing the complaint, must submit an affidavit stating that he has reviewed the case with an expert who believes the standard of care was breached. Id.

The second affidavit ("expert disclosure affidavit") must be served upon the defendant within 180 days after commencement of the suit and identify each expert plaintiff intends to call at trial, disclose the substance of the facts and opinions to which the expert will testify, and provide a summary of the grounds for each opinion. Minn. Stat. § 145.682, subd. 4. Answers to interrogatories may substitute for the expert disclosure affidavit, as long as they are provided within the requisite 180 days and contain the required information. Id.

The penalty for noncompliance is set forth in Minn. Stat. § 145.682, subd. 6. With respect to the expert review affidavit, failure to comply within 60 days after demand for the affidavit

"results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." Id. With respect to the expert disclosure affidavit, no demand is necessary to trigger the noncompliance penalties. Rather, the statute simply provides that failure to supply the affidavit within 180 days "results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." Id.

There are two methods through which a plaintiff may escape dismissal for noncompliance. First, the court may extend the time for serving the affidavits, even after the time limits

have expired, upon a showing of excusable neglect. Stern v. Dill, 442 N.W.2d 322, 324 (Minn. 1989). To claim excusable neglect, Minnesota courts require a plaintiff to satisfy four factors: (1) plaintiff has a reasonable case on the merits; (2) plaintiff has a reasonable excuse for his failure to meet the statutory time limits; (3) plaintiff has proceeded with due diligence after notice of statutory time limits; and (4) no substantial prejudice will result to defendant by the extension of time. See Parker v. O'Phelan, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987), aff'd by equally divided court, 428 N.W.2d 361 (Minn. 1988).

Second, a plaintiff need not submit expert affidavits if liability may be

established without expert testimony. Minnesota courts hold that "[e]xpert testimony is not necessary where the facts to be determined are within the common knowledge of the jury and where the results of surgical or medical treatment, viewed in the light of all the circumstances, provide a sufficient evidentiary basis to support an inference of negligence." Bauer v. Friedland, 394 N.W.2d 549, 553 (Minn. Ct. App. 1986); see also Sorenson v. St. Paul Ramsey Medical Ctr., 457 N.W.2d 186, 191 (Minn. 1990).

It is undisputed that plaintiff did not file either of the expert affidavits in a timely manner. Plaintiff commenced this lawsuit against Dr. Wynne on September 18, 1989. With his summons and complaint, plaintiff served an affidavit

of counsel stating that an affidavit of expert review could not be obtained before commencing the action because the statute of limitations was about to expire. On October 9, 1989, plaintiff was served with a demand for compliance with Minn. Stat. § 145.682.[7] Plaintiff did not comply with

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[7]This demand was made by the Mayo Foundation, who at the time was a defendant in this lawsuit. Pursuant to a stipulation by the parties, the court dismissed the Mayo Foundation on July 16, 1990. Plaintiff argues that because the Mayo Foundation is no longer a party, its October 9, 1989, demand has no statutory significance. Therefore, plaintiff argues that Dr. Wynne cannot use plaintiff's failure to comply with that demand as a defense, even though the 60 day limit to respond to the Mayo Foundation's demand for expert review expired well before the Mayo Foundation was dismissed. The court finds that it does not need to determine whether Dr. Wynne may use plaintiff's failure to comply with the Mayo Foundation's October 9, 1989, demand as a defense because plaintiff also failed to satisfy the 180 day limit for submission of an expert identification affidavit. Dr. Wynne does not have to make a demand

this demand. Allegedly, on April 4, 1990, plaintiff requested an extension of time through June 7, 1990, to comply with the statute.[8] Apparently, plaintiff did not request that the motion be set on for a hearing and he never obtained an order authorizing any extension of the time limits. June 7, 1990, passed without any expert disclosure by plaintiff.

On or about November 21, 1990, plaintiff served answers to federal defendant's interrogatories. The interrogatories included an expert interrogatory asking for the information that Dr. Wynne contends plaintiff should

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on plaintiff to use plaintiff's failure to comply with that later submission as a defense to the malpractice claim. See Minn. Stat. § 145.682, subd. 6.

[8]No record of any such motion is contained in the Clerk of Court's file.

have supplied in the required affidavits. In answer, plaintiff acknowledged: "To date expert witnesses have not been identified, apart from the physicians who rendered treatment to Plaintiff." See Exhibit C to Miller Aff. Plaintiff then named his two treating physicians but did not state that either physician would render an opinion regarding the claim for malpractice. Id. Plaintiff finally submitted an affidavit on February 7, 1991, that identified a medical expert and stated his opinions on the propriety of Dr. Wynne's examination of plaintiff. Thereafter, on February 20, 1991, plaintiff filed a motion seeking an extension of the § 145.682 time limits to

excuse his late February 7, 1991, filing.[9] That affidavit was filed well beyond the 60 day limit for demand of expert review and approximately 11 months after expiration of the 180 day limit for filing the expert identification affidavit. Therefore, dismissal of plaintiff's malpractice claim with prejudice is appropriate unless plaintiff can establish that expert testimony is not necessary to establish negligence or excusable neglect kept him from timely filing his affidavits.

A. Expert Testimony

In medical malpractice cases, Minnesota courts hold that to establish a

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[9]The court did not rule on this motion. By filing this order, the court hereby denies plaintiff's February 20, 1991, motion for an extension of time in which to file an expert affidavit.

prima facie case of negligence against a doctor a plaintiff must demonstrate:

> (1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of [plaintiff's] injuries.

Plutshack v. University of Minnesota Hospitals, 316 N.W.2d 1, 5 (Minn. 1982). Generally, expert testimony is needed to prove a prima facie case of medical malpractice. Sorenson, 457 N.W.2d at 191; Plutshack, 316 N.W.2d at 5.

Expert testimony is particularly necessary in cases involving a failure to diagnose. For example, in Todd v. Eitel Hospital, 237 N.W.2d 357 (Minn. 1975), plaintiff alleged a negligent failure to diagnose a malignancy and the court found

that expert testimony was required to prove the claim. The court reasoned that:

> This is distinctly not the kind of case where the negligence "speaks for itself" without expert medical opinion, such as where a surgeon leaves a sponge in the body or where there is unexplained injury to a healthy part of the body remote from the treatment area. Where, as here, the conduct of the physician involves the complexities of pathological diagnosis, we are not persuaded that nonmedically-trained jurors are competent to pass judgment.

Id. at 361 (footnote omitted); See also Sorenson v. St. Paul Ramsey Medical Ctr., 444 N.W.2d 848, 852 (Minn. Ct. App. 1989) (expert testimony needed to establish negligent failure to diagnose placenta abruptio), aff'd 457 N.W.2d 188 (Minn. 1990); Smith v. Knowles, 281 N.W.2d 653, 655 (Minn. 1979) (expert testimony was crucial to the plaintiff's claim where the

plaintiff alleged a negligent failure to timely diagnose and properly treat eclampsia, leading to the death of the mother and child during delivery).

Cases involving a failure to properly diagnose bear little relationship to the cases in which Minnesota courts have permitted medical malpractice cases to go forward without expert testimony. In such cases, the assessment of negligence has not required any specialized medical knowledge or evaluation of medical judgment. For instance, expert medical testimony has been found unnecessary where medical clips were left in a body after surgery, a surgeon failed to remove a sponge after surgery, a dentist let a grinding disc slip and cut a patient's tongue, administration of an anesthetic

continued after cyanosis appeared, an x-ray burn resulted from an improper x-ray, and a chemical burn resulted from improper application of a chemical. Miller v. Raaen, 139 N.W.2d 877, 880 (Minn. 1966) (summary of medical malpractice cases where expert testimony was not needed to establish liability); see also Bauer v. Friedland, 394 N.W.2d 549, 554 (Minn. Ct. App. 1986); Hestbeck v. Hennepin County, 212 N.W.2d 361, 364-66 (Minn. 1973). The Minnesota Supreme Court summarized the principles underlying those precedents as follows:

> All these cases involved situations where there was no doubt about the cause of the result complained of, and the result would not have followed in the absence of a breach of duty, the establishment of which

> did not involve any scientific knowledge.

Miller, 139 N.W.2d at 880.

Plaintiff's case is unlike any of the exceptional cases summarized in Miller. The essence of plaintiff's malpractice claim against Dr. Wynne is his alleged failure to test for and diagnose a heart attack and a belief that a jury could determine on its own that Dr. Wynne's diagnosis and treatment were medically negligent because Dr. Wynne failed to obtain an EKG of plaintiff. The result plaintiff complains of is a damaged heart, the cause of which is unknown. Evaluating Dr. Wynne's examination, diagnosis, and treatment of plaintiff will require knowledge of internal medicine and cardiology that lay jurors cannot be expected to have. Lay jurors do not

possess the knowledge to differentiate between a heart attack and other potential causes of chest pain. Therefore, the court finds that a lay jury will require expert assistance to establish the standard of care for diagnosing a heart attack and to determine whether Dr. Wynne's actions failed to meet that standard.

This is not a case of abandonment, in which a lay person might decide that a doctor's actions in completely ignoring a patient were negligent. Plaintiff admitted that Dr. Wynne responded promptly to his call for assistance, examined him, made a diagnosis, and prescribed a treatment. Plaintiff also admitted that after treating him, Dr. Wynne advised him that if his pain recurred, he should call

for assistance. Plaintiff admitted that he did not summon Dr. Wynne again that night, but waited until the morning sick call to seek further medical attention.

Even if plaintiff could establish the applicable standard of care and show Dr. Wynne's departure from that standard, the court finds that plaintiff cannot prove the third Plutshack factor, causation and damage, without expert testimony. Plaintiff suffered a heart attack and alleges that Dr. Wynne should have diagnosed the heart attack sooner by obtaining an EKG. To establish causation and damage, plaintiff must prove that the alleged delay in diagnosis caused injury beyond the injury caused by the heart attack itself, and he must provide some

basis for the jury to quantify that injury.

The court finds that a lay jury has no basis for making such a sophisticated medical judgment. Whether plaintiff's health would have been any better if the diagnosis had been made earlier is questionable. Accordingly, the court finds in this case that expert testimony is necessary to prove a prima facie case of medical malpractice and that plaintiff did not present an expert affidavit within the time limits of Minn. Stat. § 145.682. Therefore, unless plaintiff can establish excusable neglect for the late filing of his expert affidavit, plaintiff's claim must be dismissed with prejudice.

B. **Excusable Neglect**

The court finds that plaintiff has not satisfied Parker's four factor test for excusable neglect. To establish excusable neglect under Parker, plaintiff must demonstrate that (1) he has a reasonable malpractice claim on the merits, (2) he has a reasonable excuse for failing to comply with the affidavit requirements of § 145.682, (3) he diligently attempted to comply § 145.682 after notice of the statutory time limits, and (4) defendant will not be substantially prejudiced by an extension of time to comply with the statutory time limits. Parker, 414 N.W.2d at 537.

1. **Reasonable Claim on the Merits**

Plaintiff does not have a reasonable case on the merits. Even if his belated

expert's affidavit were deemed sufficient to establish the standard of care and Dr. Wynne's departure from that standard, it provides little insight into the causation and damage factor of a prima facie case of medical malpractice.

2. and 3. Reasonable Excuse and Due Diligence

Plaintiff's showing is also deficient as to the reasonable excuse and due diligence elements. Plaintiff has not shown a reasonable excuse for failing to comply with § 145.682. He was aware of the statute from the outset of this litigation, as evidenced by his counsel's preliminary affidavit under § 145.682. He was aware of the statute from the outset of this litigation, as evidenced by his counsel's preliminary affidavit under § 145.682, subd. 3(a), claiming that the

imminent expiration of the statute of limitations precluded prior expert review. Plaintiff failed to respond to defendant's requests for compliance. Specific demand for the expert review affidavit was made in October 1989, and interrogatories seeking the required expert disclosure information were served in March 1990. Plaintiff apparently sought an extension of time to satisfy the statutory requirements, but failed to obtain a hearing on that motion.

Plaintiff's counsel asserts that he had to consult eleven cardiologists before finding an expert who was willing to testify on behalf of plaintiff. Plaintiff provided no evidence as to when he consulted those cardiologists, who they were, how diligently he followed up on his

quest for an expert, and what sources he consulted in his search. Plaintiff's counsel claimed that several of the doctors were reluctant to testify against a fellow physician. Such an occurrence is quite common in medical malpractice suits and if such a claim constituted a reasonable excuse, few plaintiff's attorneys would need to worry about complying with § 145.682. Accordingly, the court finds that plaintiff has not satisfied the reasonable excuse or due diligence factors of excusable neglect.

4. **Prejudice to Defendant**

The court finds that Dr. Wynne will be substantially prejudiced if plaintiff is permitted to avoid the § 145.682 time limits. It is almost two and one-half years since the suit was filed and almost

four and one-half years since the alleged malpractice occurred. The lapse of time would cause substantial difficulty for Dr. Wynne to prepare to meet the opinions contained in the belated affidavit of plaintiff's expert.

Similar circumstances were presented in Maloney v. Fairview Community Hospital, 451 N.W.2d 237 (Minn. Ct. Ap. 1990). There, the court dismissed Maloney's medical malpractice claim against defendant doctors because Maloney did not prove excusable neglect. Id. at 240. Maloney submitted answers to interrogatories identifying expert witnesses approximately six months after expiration of the 180 day limit although he never requested an extension of time within which to satisfy the statute. The

court found that because Maloney had been aware of the statutory requirements from the beginning of the lawsuit and had been represented by the same attorney since before expiration of the statutory time limits, Maloney could not show a reasonable excuse for his failure to comply. Id. In addition, the court found that an extension of time would result in prejudice to the doctors because more than three years had passed since the alleged injury and treatment occurred and more than two years had passed since commencement of the lawsuit. Id.

In the present case, plaintiff submitted his expert affidavit approximately eleven months after expiration of the 180 day limit and approximately three and one-half years

after the alleged malpractice and more than one and one-half years after commencement of the lawsuit. Plaintiff allegedly made one request for an extension of time but failed to obtain a hearing on that motion. Plaintiff made another belated attempt to extend the statutory time limit on February 20, 1991, in response to Dr. Wynne's motion for summary judgment and failed to obtain a hearing on that motion. In addition, plaintiff was aware of the statutory time limits and has been represented by the same counsel from the beginning of this case. Therefore, the court finds that plaintiff cannot use the justification of excusable neglect to avoid the mandatory dismissal provision found in Minn. Stat. § 145.682, subd. 6.

In determining that plaintiff has not satisfied the requirements for excusable neglect, thereby causing plaintiff's suit to be dismissed on procedural grounds, the court is mindful that malpractice claims, if possible, should be decided on the merits. Sorenson, 457 N.W.2d at 192. However, the court finds that plaintiff's failure to comply with Minn. Stat. § 145.682 was sufficiently egregious to warrant dismissal on procedural grounds. Accordingly, plaintiff's medical malpractice claim is dismissed with prejudice.

IT IS HEREBY ORDERED that:

1. The federal defendants' motion to dismiss plaintiff's federal tort claim for lack of jurisdiction is granted;

2. The federal defendants' motion for summary judgment on all other claims is granted;

3. Defendant Dr. Wynne's motion for summary judgment on plaintiff's medical malpractice claim is granted;

4. The federal defendants' motion to amend its answer is granted;

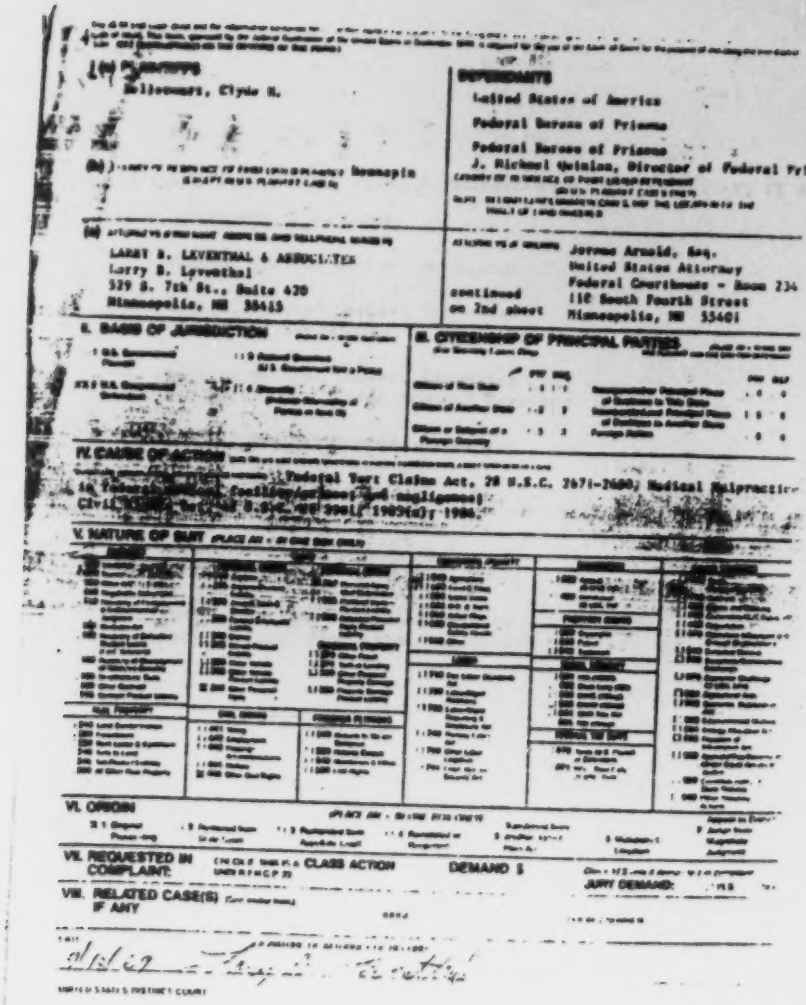
5. Plaintiff's February 20, 1991, motion to extend the time in which to comply with Minn. Stat. § 145.682 is denied;

6. Plaintiff's October 2, 1991 motion for oral reargument is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 10, 1992

/S/
David S. Doty, Judge
United States District Court



Hillesmark, Clyde H.

Hennepin

DEFENDANTS

United States of America

Federal Bureau of Prisons

Federal Bureau of Prisons

J. Michael Quinlan, Director of Federal Pris

LARRY B. LEVENTHAL & ASSOCIATES
Larry B. Leventhal
529 S. 7th St., Suite 420
Minneapolis, MN 55415

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Federal Courthouse - Room 234
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Minneapolis, MN 55401

continued on 2nd sheet

I. BASIS OF JURISDICTION

II. CITIZENSHIP OF PRINCIPAL PARTIES

IV. CAUSE OF ACTION

Federal Tort Claims Act, 28 U.S.C. 2671-2680; Medical Malpractic

V. NATURE OF SUIT

VI. ORIGIN

VII. REQUESTED IN COMPLAINT:

CLASS ACTION

DEMAND $

JURY DEMAND:

VIII. RELATED CASE(S) IF ANY

CIVIL COVER SHEET, CONT. CLYDE H. BELLECOURT V. UNITED STATES, ET AL.

I(a) DEFENDANTS, continued:

Federal Medical Center, Rochester

Federal Medical Center, Rochester
Peter Carlson, Warden

Federal Medical Center, Rochester
Dr. Michael Trujillo, Medical Director

Federal Medical Center, Rochester
Cliff Friese, Lieutenant

Mayo Foundation

Federal Medical Center, Rochester
Dr. ALan Wynne

Federal Medical Center, Rochester
Sara Urriste, Physicians' Assistant

DISTRICT OF MINNESOTA

THIRD DIVISION

CIVIL ACTION

Clyde H. Bellecourt,

Plaintiff,

COMPLAINT

vs. Court File No. _____

the United States of America,

and

the Federal Bureau of Prisons,

and

J. Michael Quinlan, Director of Federal Prisons, Washington, D.C., in his official capacity,

the Federal Medical Center, Rochester, Minnesota, a division of the Federal Bureau of Prisons,

and

Peter Carlson, Warden
Federal Medical Center,
Rochester Minnesota, in his
official capacity,

and

Dr. Michael Trujillo, Medical
Director, Federal Medical
Center, Rochester, Minnesota
in his official capacity,

and

Cliff Friese, Lieutenant,
Federal Medical Center, Rochester,
Minnesota, in his official and
individual capacities

and

the Mayo Foundation, a Minnesota
Non-Profit Corporation,
Rochester, Minnesota,

and

Dr. Alan Wynne, Resident Physician,
in his official capacities as
resident physician for Mayo
Foundation, and as an employee of the
Federal Medical Center and
individually,

and

Sarah Urriste, Physicians' Assistant, in her official capacities as Physician's Assistant for Mayo Foundation and as an employee of the Federal Medical Center and individually,

Defendants.

Plaintiff, Clyde H. Bellecourt, for his cause of action alleges:

I. NATURE OF CLAIM

1.

Plaintiff Clyde H. Bellecourt, by and through his undersigned attorneys, seeks damages for physical injury, emotional injury, pain and suffering, medical malpractice, and discrimination from the Federal Medical Center, Rochester, Minnesota, (hereinafter "Federal Medical Center"), a division of the Federal Bureau

of Prisons, an agency of the United States, from Mayo Foundation, a Minnesota Corporation doing business in Rochester, Minnesota, and others so named. Due to the deliberate indifference of the Defendants to Plaintiff's serious medical needs including life-threatening medical and psychological needs, Plaintiff, suffering a heart attack, was misdiagnosed, given the wrong course of treatment by Defendant Alan Wynne, who then abandoned Plaintiff without any medical care or institutional care for over nine hours in the midst of a life-threatening heart attack and further that such negligent care constitutes medical malpractice. Due to further deliberate indifference of Defendants to Plaintiff's serious medical needs, Plaintiff was

abandoned without medical or institutional care by Defendant Federal Medical Center, Defendant Lieutenant Friese, and Defendant Sarah Urriste for over nine hours in the midst of a life-threatening heart attack and further that such actions constitute negligence. Such abandonment and lack of institutional care were directed and/or encouraged by the policies implemented by Defendants United States, Federal Bureau of Prisons, J. Michael Quinlan, Warden Dr. Joseph B. Bogen, and Medical Director Dr. Martha Grogan.

Plaintiff reported his heart attack at approximately 12:30 a.m. on September 16, 1987, receiving antacid for treatment by Defendant Dr. Alan Wynne. Plaintiff was thereafter abandoned in his cell despite pleas for medical treatment and

received no reasonable, competent or meaningful medical attention until approximately 9:45 a.m. the following morning.

The Defendants' individual and collective acts and omissions constituted negligence, medical malpractice, and deliberate and wilful indifference to the health and safety of Plaintiff and resulted in the unnecessary and wanton infliction of physical injury and permanent damage, and pain and suffering including, but not limited to, permanent heart damage.

Such shocking and heinous conduct by government authorities and other named Defendants deprived Plaintiff of rights guaranteed by the Fifth and Eighth

Amendments to the United States Constitution and Minnesota law.

II. JURISDICTION

2.

This action is brought pursuant to the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code (28 U.S.C. §§ 2671-2680) and to Title 42 U.S.C. §§ 1981, 1985(c), and 1986 to redress the deprivations or rights secured by the Fifth and Eighth Amendment to the Constitution of the United States. This is a civil action for damages and declaratory relief.

3.

This Court has jurisdiction of these claims pursuant to Title 28 U.S.C. § 1346(b) and § 1331 , and Title 42 U.S.C.

§1988, and Plaintiff invokes the pendent jurisdiction of this Court with respect to several state law claims.

4.

Damages sustained by Plaintiff exceed $10,000.00.

5.

That Plaintiff, in compliance with all requirements of the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680), properly presented to the appropriate agency, Federal Bureau of Prisons, full notice of claim and the claim for injury and damages on November 29, 1988, by submitting a Request for Administrative Remedy to the Federal Medical Center, Rochester, Minnesota. Attached as Exhibit 1.

6.

That Plaintiff's Request for Administrative Remedy, submitted on November 29, 1988, was in full compliance with all instructions, procedures, and forms according to the instructions in the Memorandum of Warden Dr. Joseph B. Bogen, then Warden of the Federal Medical Center, Rochester, Minnesota. Attached as Exhibit 2.

7.

That Plaintiff's claim, Request for Administrative Remedy, was presented to the administrative agency, Federal Bureau of Prisons through the Federal Medical Center, in a timely manner, the November 29, 1988 claim occurring within two years of the September 16, 1987 injury.

8.

That said federal agency, Federal Bureau of Prisons, has rejected Plaintiff's notice of claim and claim, as filed in the Administrative Remedy Request, by inaction in that no response to Plaintiff's Request for Administrative Remedy was received within six (6) months or has been received to date.

9.

That this action is timely filed within the proper period following the lack of response by the administrative agency.

III. PARTIES

10.

Plaintiff Clyde Bellecourt resides in the City of Minneapolis, County of

Hennepin, State of Minnesota, which is within the District of the State of Minnesota.

11.

At all times material herein, Plaintiff Clyde Bellecourt was an inmate of the Federal Medical Center, a federal prison, located at Rochester, Minnesota, County of Olmstead, State of Minnesota, located within the District of Minnesota.

12.

The term "Defendants" as used herein refers to the named Defendants who were responsible for the particular acts and omissions specified in the Complaint.

13.

At all times material herein, Defendant United States of America, by and through the Defendant Federal Bureau of

Prisons, a federal agency of the United States, did then and now owns and operates the Defendant Federal Medical Center, a federal medical facility/prison located in the City of Rochester, State of Minnesota.

14.

Defendant J. Michael Quinlan, Washington, D.C., is the Director of Federal Prisons at all relevant times. As such, he is officially responsible for overseeing the enforcement of the laws and regulations governing federal correctional/penal institutions in the United States and the overall supervision, care and treatment of all inmates confined at the institutions operated by the Federal Bureau of Prisons. Defendant J. Michael Quinlan is sued in his official capacity.

15.

Defendant Peter Carlson is currently the Warden of the Federal Medical Center, Rochester, Minnesota. His predecessor, Dr Joseph B. Bogen was officially responsible for care and treatment of all inmates confined at the Federal Medical Center at the time events specified herein occurred. Defendant Peter Carlson is sued in his official capacity.

16.

Defendant Dr. Michael Trujillo is currently the Medical Director of the Federal Medical Center, Rochester, Minnesota. His predecessor, Dr. Martha Grogan was officially responsible for the overall operation of the medical facilities operating within the institution as well as for the care and

treatment of those inmates who come in contact with such facilities at the time events specified herein occurred. Defendant Dr. Michael Trujillo is sued in his official capacity.

17.

Defendant Cliff Friese was a Lieutenant employed by the Federal Medical Center and a staff supervisor on duty at the time Plaintiff first experienced symptoms of the heart attack. Defendant Friese was charged with responsibility for the general safekeeping of Plaintiff, as well as for obtaining immediate care and treatment of Plaintiff when he was stricken with a heart attack while Defendant Friese was on duty from midnight to 7:00 a.m., while Plaintiff was confined to his cell without access to medical

staff. Cliff Friese is sued in his official and individual capacities.

18.

Defendant Mayo Foundation is a non-profit corporation, duly licensed to do business in the State of Minnesota. Defendant Mayo Foundation, by an agreement or contract the details of which are not known to Plaintiff, provides medical personnel and equipment to the Federal Medical Center.

19.

Defendant Dr. Alan Wynne was and is a Resident Physician who is employed by the Federal Medical Center and/or the Mayo Foundation. Defendant Dr. Alan Wynne was officially responsible for the immediate medical care and treatment of inmates, including Plaintiff, and for providing or

obtaining further necessary care while he was at the Federal Medical Center particularly on September 16, 1987 when he was stricken with a life-threatening heart attack shortly after midnight. Dr. Alan Wynne is sued in his official capacity as an employee of the Federal Medical Center and/or Mayo Foundation and individually.

20.

Defendant Sarah Urriste was and is a Physician's Assistant employed by the Federal Medical Center and/or the Mayo Foundation. Sarah Urriste was officially responsible for the immediate medical care and treatment of inmates including Plaintiff while he was at the Federal Medical Center particularly on September 16, 1987, when he was stricken a life-threatening heart attack. Sarah Urriste

is sued in her official capacity as an employee of the Federal Medical Center and/or the Mayo Foundation and individually.

IV. STATEMENT OF FACTS

21.

Plaintiff was confined to the custody of the Federal Bureau of Prisons in July of 1986 by virtue of conviction of violation of a federal criminal law.

22.

Plaintiff was originally confined in July of 1986 at the Springfield Federal Medical Center in St. Louis, Missouri, after being designated to be placed at the Federal work camp in Duluth, Minnesota. Said designation was withdrawn after the United States District Court permitted

Plaintiff's attendance at ceremonies at Big Mountain in Arizona. Plaintiff's assigned duties at Springfield Medical Center were as a first class painter.

23.

Plaintiff, upon information and belief, states that he was confined at Springfield Medical Center in order to isolate him because of his political beliefs as a leader of the American Indian Movement and his work as an organizer in the Indian community. While confined there, Plaintiff actively expressed his political and religious beliefs relating to his right as a Native American to have access to the sweatlodge and to have Indian religious leaders come into the prison and achieved reform and change in the right of Indian prisoners to practice

their traditional Native American religion.

24.

Plaintiff was informed, while at Springfield Federal Medical Center, that he would be transferred to the federal prison near Duluth, Minnesota. In May, 1987, Plaintiff was transferred to the Federal Medical Center in Rochester, Minnesota where he was an inmate at all times material herein.

25.

Within one day of arriving at the Federal Medical Center, Plaintiff was assigned to work in the kitchen where the temperature ranged from ninety (90) to one hundred and twenty (120) degrees where he worked until several weeks before his heart attack. Plaintiff, upon information

and belief, states that such treatment constituted different and discriminatory treatment of him because of his race, Native American, and his political and religious beliefs relating to the American Indian Movement in that the policy was that prisoners, such as Plaintiff, over the age of fifty were not assigned to work in the kitchen. Such an assignment was improper under the normal policies of the Federal Medical Center and such was made with the knowledge that it constituted a health risk to Plaintiff.

26.

Defendant Federal Medical Center is a federal prison specifically equipped with the medical personnel and equipment necessary to provide special medical care to federal inmates. Defendant Mayo

Foundation, by agreement and/or contract with the Federal Medical Center, is specifically equipped with the medical personnel and equipment necessary to provide full medical care and treatment to inmates in life-threatening crises such as Plaintiff's heart attack.

27.

Defendant Dr. Alan Wynne, M.D., at all times material herein, was a physician, duly licensed to practice medicine in the State of Minnesota, and there existed between Plaintiff and Defendant Dr. Alan Wynne a doctor-patient relationship.

28.

Defendant Dr. Alan Wynne was negligent and careless in breaching the standard of care practiced by other

members of the medical profession in his medical treatment of Plaintiff in several respects including, but not limited to:

A. Failing to diagnose a serious medical crisis, a heart attack in progress;

B. Failing to adequately and competently perform necessary and prudent tests;

C. Failing to give credence to the description of symptoms, complaints, request for assistance, and request for further testing of his patient, Plaintiff;

D. Wrongfully prescribing improper and inadequate medication for Plaintiff's

physical symptoms and serious medical crisis;

E. Effectively denying Plaintiff the benefit of meaningful and competent medical services by himself or other medical personnel; and

F. Abandoning Plaintiff without access to further medical care in the midst of a life-threatening crisis and after having failed to provide meaningful and competent medical care and treatment to address Plaintiff's life-threatening medical crisis.

29.

At various times during the period of confinement, medical doctors and/or

personnel employed by Defendants examined Plaintiff to determine his general health.

30.

Plaintiff on September 16, 1987, at approximately 12:30 a.m. while confined to his cell, Plaintiff was stricken with a heart attack, experiencing severe pain in his chest and right arm, and was unable to close his right hand. Plaintiff instructed inmate Charles Whalen, who was also living in the cell, to notify the Lieutenant's office that Plaintiff was having a heart attack.

31.

Defendant Lieutenant Cliff Friese, along with several guards, came to Plaintiff's cell in response to his call for help. Plaintiff informed Defendant Friese that he was experiencing severe

pain in his chest and right arm and having problems closing his right hand and that he was certain he was having a heart attack. Lieutenant Friese then radioed for Defendant Dr. Alan Wynne.

32.

Defendant Dr. Alan Wynne arrived shortly in response to Lieutenant Friese's radio call for help. Plaintiff informed Dr. Wynne that he was having a heart attack, the severity of his pain, and the symptoms. Defendant Wynne sent a guard to a separate building to obtain two nitroglycerin tablets which he then administered to Plaintiff. Defendant Wynne then diagnosed Plaintiff as having indigestion and gastritis and ignored Plaintiff's explanation that he had no stomach problems, repeated statements of

intense pain, and declarations that he was suffering a heart attack. Defendant Wynne ignored Plaintiff's request that he be taken to the hospital on site at the Federal Medical Center for an Electrocardiogram, gave Plaintiff an antiacid, and left Plaintiff's room. Defendant Wynne did not return or in any way follow up during the night to check on Plaintiff's condition, thus abandoning him without medical assistance.

33.

Defendant Lieutenant Friese did not return or in any way check on Plaintiff during the course of the night to determine Plaintiff's condition or to determine if further assistance was needed. Plaintiff remained in severe pain

throughout the night, assisted only by his cellmates.

34.

At 7:00 a.m. sick call, a guard on duty allowed Plaintiff to go to Sick Call at the Hospital. Plaintiff arrived at 7:20 a.m. met with Defendant Sarah Urriste, Physician's Assistant who was taking appointment for the morning. Plaintiff informed Defendant Urriste of the pain and the symptoms he was having. Defendant Urriste told Plaintiff to sit in the waiting area and left Plaintiff sitting for two hours without rendering him assistance in any manner. Defendant Urriste allowed Plaintiff to be removed from the hospital waiting area at 9:15 a.m. to be taken to a dentist appointment. The dentist, however, refused to see

Plaintiff because he looked very ill, and sent him back to the hospital waiting area. Defendant Urriste continued to allow Plaintiff to sit unattended upon being sent back from the dentist appointment.

35.

Defendants refused and failed to properly assess Plaintiff's medical condition, to properly diagnose the heart attack, or to administer the proper course of treatment and/or medication. Defendants further abandoned Plaintiff unattended for a period of over nine hours in the middle of a life threatening heart attack without returning to in any manner ascertain his physical condition.

36.

Defendants knew or should have known the symptoms which Plaintiff exhibited evidenced a heart attack which was life-threatening, yet refused and failed to diagnose and treat the heart attack and/or to obtain competent medical personnel to administer reasonable, competent and meaningful medical care to Plaintiff.

37.

As a direct result of the failure to diagnose, misdiagnosis, failure to prescribe the proper course of treatment, failure to order proper testing, prescribing improper treatment, and abandonment of Plaintiff without rendering reasonable, competent, or standard medical treatment, Plaintiff has suffered

permanent damage and injury to his heart, his arteries, and his general health.

38.

The Defendants' acts and omissions constituted deliberate indifference and conscious disregard for the care and safety of Plaintiff and thus prolonged the life-threatening medical crisis and greatly aggravated the physical damage caused to Plaintiff by the heart attack.

39.

In doing and omitting to do all of the actions alleged herein, the above-named and described employees of Defendants United States of America, Federal Bureau of Prisons, Federal Medical Center, and Mayo Foundation were acting within the scope of their respective

employments and with the permission and consent of Defendants.

40.

Defendants Federal Bureau of Prisons, J. Michael Quinlan, Director of the Federal Bureau of Prisons, the Mayo Foundation, the Federal Medical Center at Rochester, Minnesota, Warden Peter Carlson, and Dr. Michael Trujillo, Medical Director, failed to take the necessary steps to prepare, administer, and implement proper and adequate policies to assure that reasonable, competent, and meaningful medical personnel and equipment would be available for medical emergencies such as Plaintiff suffered, despite the fact that the institution within which Plaintiff was confined was designated a federal medical facility which had

recently been renovated with state of the art diagnostic and treatment equipment

41.

Defendant Dr. Alan Wynne was a resident physician employed by Defendants Federal Medical Center and/or Mayo Foundation who responded to an emergency medical call to administer to Plaintiff when he was stricken with the heart attack in the early morning hours of September 16, 1987. Dr. Wynne was aware of Plaintiff's serious condition, and was deliberately indifferent to Plaintiff's serious medical needs by failing or refusing to properly evaluate and treat Plaintiff which resulted in physical injury and permanent damage, emotional suffering, pain and suffering. Dr. Alan Wynne, with negligence and deliberate

indifference to the serious medical needs of Plaintiff, proclaimed Plaintiff's heart attack to be "gastritis", ignored Plaintiff's medical symptoms and complaints, ignored Plaintiff's request that an Electrocardiogram be performed, and abandoned Plaintiff while he was in serious need of medical treatment in the midst of a life-threatening crisis, and when Plaintiff had no access to other medical treatment.

42.

Defendant Sarah Urriste was a physician's assistant employed by Federal Medical Center and/or Mayo Foundation and responsible for administering care and treatment and obtaining immediate medical or physicians' assistance in medical emergencies. Defendant Urriste was

responsible for intake on the morning of September 16, 1987, when Plaintiff presented himself for treatment. Defendant Urriste was deliberately indifferent to Plaintiff's medical needs by failing or refusing to provide or obtain necessary care and treatment for Plaintiff and directing that he keep a pre-existing dental appointment located away from the hospital area rather than be seen by a doctor. Such negligent and deliberately indifference by Defendant Urriste conduct resulted in physical injury and permanent damage, emotional suffering, pain and suffering experienced by Plaintiff.

43.

Defendant Lieutenant Cliff Friese was employed as lieutenant on the correctional

staff of the Federal Medical Center on September 16, 1987, and was the supervisor on duty when Plaintiff's medical crisis occurred. Defendant Friese was aware of or should have been aware of Plaintiff's condition and was deliberately indifferent to Plaintiff's needs by failing or refusing to provide or obtain reasonable, competent or meaningful assistance for Plaintiff resulting in physical injury and permanent damage, emotional suffering, and pain and suffering experienced by Plaintiff. Defendant Lieutenant Friese knew or should have known that Defendant Dr. Alan Wynne was not providing reasonable, competent or meaningful medical assistance, and was deliberately disregarding and belittling Plaintiff's concerns, thus placing his life in

jeopardy. Defendant Lieutenant Friese was negligent in not relating the urgency of Plaintiff's medical crisis, in not transferring Plaintiff to available on site medical facilities for complete diagnosis and such medical treatment as thereby shown to be warranted, in failing to obtain reasonable, competent and meaningful medical assistance during Plaintiff's continuing serious medical crisis once Defendant Dr. Wynne had abandoned Plaintiff, and failing to alert a physician whose training and practice was appropriate and competent to diagnose and treat the serious medical crisis of Plaintiff.

44.

Defendant Mayo Foundation, on information and belief, during all times

herein material, employed Defendant Dr. Alan Wynne as a resident physician and supervised his specialized medical studies. On information and belief, the services of Dr. Alan Wynne and others were provided by Defendant Mayo Foundation to Defendant Federal Medical Center, Rochester, Minnesota, under a contractual arrangement. Defendant Mayo Foundation breached its duty and obligation to properly train and supervise Defendant Dr. Alan Wynne and to assure that medical care being provided by said doctor and within said institution constituted reasonable, competent and meaningful medical care.

45.

Defendants Bureau of Prisons and Federal Medical Center had adopted as an institutional policy, within which

Defendant Dr. Wynne operated, ignoring the medical emergencies of persons which occurred during the night in cases where the medical condition cannot be immediately ascertained thus exposing inmates, including Plaintiff, to risk of greater physical injury and damage, deterioration of their physical condition, escalation of the severity of the medical crisis, and pain and suffering.

46.

Defendants Federal Bureau of Prisons, Federal Medical Center, and Mayo Foundation had in place reasonable and proper medical equipment, and competent professional medical personnel immediately available, capable of immediately diagnosing the serious medical needs and condition of Plaintiff but under the

policies of the Federal Medical Center Plaintiff was denied access to and the facilities and personnel.

47.

During the early morning hours of September 16, 1987, Defendants knew or should have known that Plaintiff was in a helpless condition, yet they failed and refused to diagnose or treat Plaintiff. As a result of Defendants' acts and omissions, Plaintiff suffered unnecessary physical injury and permanent damage, emotional suffering, and pain and suffering.

48.

Defendant Federal Medical Center is a federal prison deliberately established and equipped as a medical hospital for the care and treatment of medical needs and

had all proper and adequate facilities on site at the prison to treat Plaintiff's medical crisis properly and/or to initiate diagnosis and treatment before transferring Plaintiff to Mayo Foundation and/or its affiliates. Defendants, however, refused and failed to place Plaintiff in these proper facilities, instead abandoning him for over nine hours without medical care after his initial contact with a physician, Defendant Wynne. As a result, Plaintiff did not receive adequate care and treatment of his serious and life-threatening medical needs and was permanently injured.

49.

At all times during Plaintiff's medical crisis, his care and custody was entrusted to the designated correctional

officers, particularly Defendant Lieutenant Friese, and medical personnel of Defendants, particularly Defendant Dr. Wynne, resident physician, and Defendant Sarah Urriste, physician's assistant. Defendants Friese, Wynne and Urriste, via their acts and omissions, exhibited a deliberate indifference and conscious disregard of the known and life-threatening condition of Plaintiff. As a result of the acts and omissions of Defendants Friese, Wynne, and Urriste, Plaintiff's condition went unattended and Plaintiff suffered permanent injury.

50.

Defendants, in their acts and omissions, were further negligent and further breached their duty of care owed to Plaintiff in that had a dentist not

recognized that Plaintiff was experiencing a serious medical crisis and arranged for medical treatment for Plaintiff, the negligence of Defendants would have led to further denial of medical care and attention to Plaintiff in the midst of a life-threatening crisis.

51.

Defendants and their employees owe a duty of care to provide reasonable medical care to Plaintiff as an inmate incarcerated by Defendants in order to prevent physical and mental damages and loss to Plaintiff as an incarcerated inmate.

52.

Defendants and their employees negligently breached the duty of care owed to Plaintiff to provide reasonable medical

care, specifically Plaintiff, in the midst of a heart attack, was so casually observed and ignored by Defendants that he was is diagnosed and thereafter abandoned to languish for over nine hours before Plaintiff received any treatment for or attention to his medical crisis.

53.

That among the reasons for Defendants' indifference to the safety, well-being, and physical health and needs of Plaintiff was Defendants' knowledge that Plaintiff is an American Indian, is a founder of the American Indian Movement, had been an outspoken advocate on behalf of American Indian rights for over two decades, and was an advocate for the rights of American Indian prisoners within

the institution into which he was confined.

54.

As a direct and proximate cause of the acts and omissions of the Defendants, Plaintiff suffered physical injury and permanent damage, emotional suffering, and pain and suffering, including but not limited to a severely damaged heart and blocked artery. Plaintiff has required extensive hospitalization and has and will in the future require medical care and attention and pharmaceuticals, all arising from the negligence of Defendants and each of them.

55.

Plaintiff has and in the future will be required to restrict and limit his daily activities.

56.

All of the foregoing acts and omissions constituted deliberate and wilful indifference of the Defendants to the serious and life-threatening medical needs of Plaintiff and resulted in the unnecessary and wanton infliction of pain and suffering upon Plaintiff and ultimately resulted in permanent physical injury and damage occurring as a result of the acts and omissions of Defendants on September 16, 1987, while still in the care, custody, and control of the Defendants.

57.

Plaintiff, as a result of the Defendants breach of the duties owed to him, including but not limited to negligence, medical malpractice, and

deliberate indifference to his serious medical needs, suffered physical injuries including, but not limited to, permanent damage to his heart and the almost complete closure of a major artery to the heart, all of which damage imposes continuing physical limitations upon Plaintiff and places him in continuing risk of further episodes of heart attack or serious irregularity endangering his life.

58.

That the negligence and wrongful conduct as set forth above of Defendants and their employees is the direct and proximate cause of injury and damages suffered by Plaintiff.

V. CAUSES OF ACTION

59.

Paragraphs 1 through 58 above are incorporated herein by reference as to each of the causes of action specified below.

60.

With respect to each of the causes of action, Defendants knew or should have known of Plaintiff's condition; knew or should have known the generally recognized standards of medical care; and knew or should have known the consequences to Plaintiff of their acts and omissions as described in paragraphs 1 through 52 above and chose with negligence and gross indifference to proceed despite such consequences.

61.

FIRST CAUSE OF ACTION

Negligence

Plaintiff repeats and realleges the allegations as set forth herein above within paragraphs 1 through 60.

By reason of the individual and collective negligence of each Defendant and as a direct and proximate result of such negligence, Plaintiff has suffered serious and permanent physical and emotional injury, including but not limited to permanent heart and artery damage, together with associated pain and suffering, mental distress and physical limitations.

Plaintiff has required extensive surgery and hospitalization and has and will in the future require medical care

and attention and pharmaceuticals, together with limitation of his daily activities, all arising from the negligence of Defendants and each of them.

62.

SECOND CAUSE OF ACTION

Medical Malpractice

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 60.

The acts and omissions set forth above occurring within the doctor-patient relationship between Plaintiff and Defendant Dr. Alan Wynne, M.D., operating through his employer the Mayo Foundation, constitute gross negligence and medical malpractice in that said Defendant was negligent and careless in breaching the standard of care practiced by other

members of the medical profession in his care and treatment of Plaintiff as specified above.

As a direct and proximate result of Defendants' negligence, medical malpractice, and breach of the standard of care practiced by other members of the medical profession, Plaintiff has suffered serious and permanent heart and artery damage together with other physical and emotional injury with associated pain and suffering and mental distress. Further, as a direct and proximate result of such negligence, medical malpractice, breach of the standard of care, and malfeasance, Plaintiff has required extensive surgery and hospitalization and has and will the future require medical care and attention and pharmaceuticals, together with

limitations of his daily activities, all arising from the negligence of Defendants Dr. Alan Wynne, M.D. and the Mayo Foundation.

63.

THIRD CAUSE OF ACTION

Fifth Amendment Claim

Plaintiff repeats and realleges the allegations as set forth herein above within paragraphs 1 through 60.

The Defendants' acts and omissions, taken individually and in their totality, constituted deliberate indifference to Plaintiff's serious medical needs and constituted violations of the Fifth Amendment to the Constitution of the United States, which prohibits discrimination and/or unequal treatment

based upon race, color, religion, or political belief.

64.

FOURTH CAUSE OF ACTION

Eighth Amendment Claim

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 60.

The Defendants' acts and omissions, taken individually and in their totality, constituted deliberate indifference to Plaintiff's serious medical needs and constituted violations of the Eighth Amendment to the Constitution of the United States, which prohibits cruel and unusual punishment.

65.

FIFTH CAUSE OF ACTION

Civil Rights Violation

42 U.S.C. §1981

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 60.

Plaintiff while confined within the care, custody and control of the Defendant Federal Bureau of Prisons had a right to the full and equal benefit and protection of all laws and regulations as is enjoyed by white citizens and had a right to equal treatment and not to be made to suffer punishment or pain of a greater or different kind than that suffered by white citizens.

Defendants treated Plaintiff differently than other prisoners through

failure to provide reasonable, competent, and standard medical care because of their bias against Plaintiff based upon his race the fact he is a leader of the American Indian Movement, an Indian community organizer, and an advocate on behalf of political beliefs and religious rights for American Indians both outside of and within the prison system, all in violation of 42 U.S.C. §1981. Plaintiff was further treated differently to his disadvantage through prison and work duty assignment exposing him to otherwise unacceptable medical health risk.

Plaintiff suffered permanent physical and emotional injury, including permanent heart and artery damage, together with pain and suffering all as described herein above, arising from the unequal treatment

by Defendants biased against him because of his race and color - American Indian, and political and religious beliefs.

That as a direct and proximate result of such violation of Plaintiff's Civil Rights, Plaintiff has suffered permanent physical and emotional injury, including but not limited to permanent and disabling heart and artery damage, together with pain and suffering and has and will further experience physical limitations and the need for continuing medical care, pharmaceuticals and hospitalization.

66.

SIXTH CAUSE OF ACTION

Civil Rights Violation

42 U.S.C. §1985(c)

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 56.

Defendants by and among themselves conspired to and violated Plaintiff's civil rights by depriving him, either directly or indirectly, of the equal protection of the laws and/or of equal privileges and immunities under the laws as set forth above, all in violation of 42 U.S.C. § 1985(c).

Plaintiff suffered permanent physical and emotional injury including permanent heart and artery damage, together with pain and suffering, as described

hereinabove arising as a direct and proximate result from such denial of his civil rights.

That as a direct and proximate result of such violation of Plaintiff's Civil Rights, Plaintiff has suffered permanent physical and emotional injury, including but not limited to permanent and disabling heart and artery damage, together with pain and suffering and has and will further experience physical limitations and the need for continuing medical care, pharmaceuticals and hospitalization.

67.

SEVENTH CAUSE OF ACTION

Statutory Claim

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 60.

Defendants had a duty under Minnesota Statute §144.651 and federal law, to protect Plaintiff against abuse and to prohibit cruel treatment. Defendants failed to carry out their duty.

That as a direct and proximate result of such deliberate conduct and/or deliberate indifference of Defendants to Plaintiffs medical needs, Plaintiff suffered physical injury, permanent damage, emotional suffering, and pain and suffering as described hereinabove.

68.

EIGHTH CAUSE OF ACTION

Violation of Duty, Director

Federal Bureau of Prisons

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 60.

Defendant J. Michael Quinlan, as Director of the Federal Bureau of Prisons owed a duty to Plaintiff under the laws and regulations of the United States government to oversee the enforcement of the laws and regulations governing penal institutions within the United States and to oversee the supervision of the institutions where Plaintiff was confined.

Defendant violated his duty to Plaintiff since he knew or should have known of the acts and omissions which

caused Plaintiff's physical injury, permanent damage, emotional suffering, and pain and suffering, and failed or refused to take precautionary measures to prevent injury, damage and harm to Plaintiff, or failed in his duty to promulgate regulations or issue directives or take such actions as would have prevented injury, damage and harm to Plaintiff.

That as a direct and proximate result of such violation of duty, Plaintiff has suffered permanent physical and emotional injury, including but not limited to permanent and disabling heart and artery damage, together with pain and suffering and has and will further experience physical limitations and the need for continuing medical care, pharmaceuticals and hospitalization.

69.

NINTH CAUSE OF ACTION

Violation of Duty, Warden of Federal Medical Center, Rochester

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 60.

Defendant Peter Carlson and his predecessors, as Warden of the Federal Medical Center, owed a duty to Plaintiff and other similarly situated under the laws and regulations of the United States government to oversee the enforcement of the laws and regulations governing penal institutions within the United States and to oversee the supervision of the institutions where Plaintiff was confined.

Defendant Peter Carlson's predecessor, Dr. Joseph B. Bogen, violated

the duty of the office to Plaintiff since he knew or should have known of the acts and omissions which caused Plaintiff's physical injury, permanent damage, emotional suffering, and pain and suffering, and failed or refused to take precautionary measures to prevent injury, damage and harm to Plaintiff, or failed in his duty to promulgate regulations or issue directives or take such actions as would have prevented injury, damage and harm to Plaintiff.

That as a direct and proximate result of such violation of duty, Plaintiff has suffered permanent physical and emotional injury, including but not limited to permanent and disabling heart and artery damage, together with pain and suffering and has and will further experience

physical limitations and the need for continuing medical care, pharmaceuticals and hospitalization.

70.

TENTH CAUSE OF ACTION

Violation of Duty, Medical Director, Federal Medical Center

Plaintiff repeats and realleges the allegations as set forth herein within paragraphs 1 through 60.

Defendant Dr. Michael Trujillo and his predecessors, as Medical Director for the Federal Medical Center, owed a duty to Plaintiff under the laws and regulations of the United States government to oversee the enforcement of the laws and regulations governing penal institutions within the United States and to oversee

the supervision of the institutions where Plaintiff was confined.

Defendant Dr. Michael Trujillo's predecessor, Dr. Martha Grogan, violated her duty to Plaintiff since she knew or should have known of the acts and omissions which caused Plaintiff's physical injury, permanent damage, emotional suffering, and pain and suffering, and failed or refused to take precautionary measures to prevent injury, damage and harm to Plaintiff, or failed in her duty to promulgate regulations or issue directives or take such actions as would have prevented injury, damage and harm to Plaintiff.

That as a direct and proximate result of such violation of duty, Plaintiff has suffered permanent physical and emotional

injury, including but not limited to permanent and disabling heart and artery damage, together with pain and suffering and has and will further experience physical limitations and the need for continuing medical care, pharmaceuticals and hospitalization.

VI. RELIEF REQUESTED

WHEREFORE, Plaintiff prays for and requests this Court grant him the following relief:

1.

That this Court award the Plaintiff the full value of the damage and injury he has suffered as a result of the Defendants acts and omissions, as against the Defendants jointly and severally in the amount of $5,000,000.00.

2.

That this Court enter a declaratory judgment, pursuant to 28 U.S.C. §2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure, declaring that the acts and omissions of Defendants violated the right of Plaintiff to be free from discrimination and unequal treatment because of his race, color, religious beliefs, and political beliefs as guaranteed by the Fifth Amendment to the Constitution of the United States, and violated Minnesota law.

3.

That this Court enter a declaratory judgment, pursuant to 28 U.S.C. §2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure, declaring that the acts and omissions of Defendants violated the

right of Plaintiff to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the Constitution of the United States, and violated Minnesota law.

4.

That this Court order the Defendants to pay the Plaintiffs costs, expenses, and attorney's fees for this action; and

5.

That this Court grant such other and further relief as this Court deems just and proper.

Dated: this 18th day of September, 1989.

Respectfully submitted,

/S/

Larry B. Leventhal
Leventhal and Associates
Attorney I.D. # 62534
Suite 420, Sexton Building
529 South Seventh Street
Minneapolis, Minnesota 55415
Phone: 612/333-5747

/S/

Douglas Hall
Legal Rights Center
Attorney I. D. # 39688
808 East Franklin Avenue
Minneapolis, Minnesota 55406
Phone: 612/871-4886

Counsel for Plaintiff

VERIFICATION

I, Clyde Bellecourt, the Plaintiff herein, being first duly sworn upon oath, declare and allege that I have read the above and foregoing Complaint, know the contents herein, and that the same is true to the best of my knowledge and belief.

/S/
Clyde Bellecourt, Plaintiff

Subscribed to and sworn to before me this 18th day of September, 1989.

/S/
Notary Public

CLYDE H. BELLECOURT, #02501-041
2419 18th Avenue South,
Minneapolis, MN 55404

November 29, 1988

Associate Warden (Programs)
Federal Medical Center, Rochester
U.S. Department of Justice
Federal Bureau of Prisons
Rochester, MN 55901

RE: Request for Administrative Remedy

Dear Associate Warden Olson:

I am enclosing herewith, a Request for Administrative Remedy on form BP-DIR-9, with an attached account specifically setting forth the circumstances of which I make complaint.

It is my view that while I was an inmate at the Federal Medical Center, Rochester I suffered extensive medical deterioration due to the fact that I did not receive timely treatment for a heart attack while it was in progress. In fact, as is elaborated upon in my account, I first alerted appropriate prison personnel to my medical emergency at 12:30 a.m. on September 16, 1987. However, I received no bona fide medical attention until approximately 9:45 a.m. the following morning.

I have presented my complaints seeking an appropriate rememdy to various prison personnel including Keith Farrell, my counselor; Paul Schultz, my case manager; Associate Warden Helman; and Hospital Administrator Dr. P. Benantz. The matter, however, has not been resolved and I am therefore addressing to you the attached formal Request for Administrative Remedy.

You may contact me at the above address. My telephone is (612) 722-4423. Alternatively you may contact me through one of my attorneys, Larry Leventhal, 420 Sexton Building, 529 S. 7th Street, Minneapolis, MN 55415 or Douglas Hall, Legal Rights Center, 808 E. Franklin Ave., Minneapolis, MN 55404.

Thank you for your attention to this matter.

Very truly yours,

Clyde H. Bellecourt

...ral Prisons

...ecessary). If additional space is needed, continue on reverse. Additional attachments are permitted.

BELLECOURT, CLYDE H.	# 02501-041	Federal Medical Center Rochester, Minnesota
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT / INSTITUTION

Part A - INMATE REQUEST

...narrative attached on following pages.

11/9/88
DATE

Clyde H. Bellecourt
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

...SIGNATURE OF REGIONAL DIRECTOR

...returned with the response to you. If dissatisfied with this response, you may appeal to the Central Office within 20 calendar days of the date of this response.

ORIGINAL RETURNED TO INMATE

CASE NUMBER

Part C - RECEIPT

CASE NUMBER

...LAST NAME, FIRST, MIDDLE INITIAL

...UNIT

...INSTITUTION

BEST AVAILABLE COPY

BP-DIR-9 REQUEST FOR ADMINISTRATIVE REMEDY

PRISON FORM NUMBER: RCH 1330.7

CLYDE H. BELLECOURT, #02501-041

While an inmate at the Federal Medical Center, Rochester, Minnesota, the undersigned Clyde Bellecourt, Registration Number 02501-041, suffered a severe heart attack on September 16, 1987. The medical treatment given myself while suffering this heart attack indicated gross indifference to my serious medical needs. As a result, I suffered pain and mental anguish, and am now permanently physically disabled, and subject to loss of ability to fully lead my life as prior to the substandard and negligent care I received.

The Federal Medical Prison at Rochester, Minnesota, owes all prisoners

including myself a duty to provide reasonable medical services particularly in that prisoners do not have access to physicians of their own choosing. The care I received from prison staff was substandard and evidenced gross indifference to my well-being in a life-threatening situation. Specific staff members from whom I requested an explanation regarding the lack of medical attention I received include: Warden Joseph B. Bogan and Lieutenant Friese.

Further, the institution in which I was held at the time I suffered the heart attack is a Federal Medical Center with facilities available to render the treatment I was denied.

On September 16, 1987, at about 12:30 a.m. I instructed Inmate Charles Whalen, who was living in my room, to notify the Lieutenant's Office that i felt that I was having a heart attack. At that time I was experiencing severe pain in my chest, my right arm, and I was unable to close my right hand.

Lieutenant Friese, who was on duty, did respond to my call for help, long with several guards. Mr. Friese asked me what the problem was. I informed Mr. Friese that I was experiencing severe pain in my chest, arm, and having problems closing my right hand, and I was sure that I was having a heart attack. The Lieutenant immediately radioed for help, and shortly

thereafter resident physician Dr. Alan Wynne arrived.

Dr. Wynne examined me and kept asking me the following question: On scale of 0-10 what would I say the severity of my present pain was? I told him I would to rate it a 10. He then asked me if I had experienced pain like this before? I told him that I had been shot just below the heart in 1973. He then asked me if the present pain that I was experiencing was any comparison to that. I informed Dr. Wynne that my present pain was much worse than the pain of being shot. Dr. Wynne having no nitroglycerin with him sent a guard to another building to get some. Two tablets were than given to me, but they only relieved the pain partially for

just a few seconds. After further examination Dr. Wynne began to diagnose my pain as indigestion and gastritis. At this point I began to get very upset with the type of treatment I was receiving because I was sure that I was having a very serious heart attack. However, I was unable to convince Dr. Wynne that I was having a heart attack. I told him several times that I had no problems digesting food. I could eat just about anything, and have no stomach problems. I have no medical history of stomach problems. It was about eight hours after I had dinner that these pains began, and I was not constipated. It was my feeling, which I expressed, that I should be taken to the hospital for an Electrocardiogram. However, Dr. Wynne stated I only had

gastritis and gave me an antacid. Dr. Wynne then advised me that if I still had this problem later on I should put in another call.

My roommates lent me some pillows so I could arch my back in a setting position, as this was the only way I could relieve some of the pressure and pain. I was in continuous pain throughout the night. At about 4:30 a.m. the pain got even worse, and I became very dry. Since I was having a hard time breathing, I got out of bed to get a drink of water. I had a very hard time just walking to the drinking fountain about 30 yards from my room, and barely made it back. I thought of calling for the Doctor once again, but also felt that they would not listen to

me, nor believe me in any way. I was even afraid to go to sleep at this point in fear that I would never wake up. However, I was so exhausted that I eventually blacked out.

I awoke again in severe pain and sweat at 6:30 a.m., and made up my mind that I would stay awake until 7:00 a.m. Sick Call and that perhaps then I might be able to convince someone at the hospital to check my heart, or maybe I could at least contact the Warden, and ask for help. Shortly after 7:00 a.m. the Officer on duty came by to check on me. He told me that I looked very bad and should go over to the hospital. I had a very difficult time just getting dressed. It was very hard just to walk. About halfway

to the hospital I had to rest momentarily on some benches. I then proceeded to the hospital.

I arrived at the hospital about 7:20 a.m. and I met with Physician's Assistant Sarah Urriste who was making appointments that morning. I informed here of the pain I was having. She realized at that point that I was the same person having chest pains earlier in the morning. She asked me the same standard questions, on a scale of 0-10 where would I put my present pain in comparison to earlier in the morning when I was diagnosed by Dr. Wynne. I told her that I would have to rate my present pain at an 11, because it was bad at this point. She informed me that I should not go to work,

and I should have a seat in the waiting room and they would take care of me immediately.

I sat in the waiting room for almost two hours, until 9:15 a.m., with no assistance at all. During the same period several other inmates with minor colds were being taken care of. At 9:15 a.m. I had a previously scheduled dental appointment, and dental personnel came and got me to take a mold for a partial denture. I was in the dental office for just a few minutes, when Dr. Soddard, the Dentist and his Assistant Michelle sent me back to the waiting room, stating that I looked really bad health wise.

At about 9:45 a.m. Dr. Thorne came into the hospital. I was taken into the examining room and hooked up to the Electrocardiogram machine. It was then confirmed that I had a heart attack, and was still having a heart attack. An ambulance was called from St. Marys Hospital in Rochester. When they arrived I was given shots to relieve the pain, hooked up to IV's and rushed downtown.

I spent nine days at St. Marys Hospital at which time an Angiogram was taken, which was able to pinpoint the exact damage to my heart. One of my main arteries in the front of my heart, half-way down, was completely closed, another artery, which branched off from this artery, is 80% closed.

I was discharged from St. Marys Hospital on September 24, 1987, and was placed in the Medical Surgical Unit at the Medical Center.

I believe that there was outright negligence by the staff of the Federal Medical Center. This negligence has caused irreparable damage to my heart, and my future health.

Specific staff, under the direction of the Federal Medical Center, who proved grossly indifferent to my medical crisis include Resident Physician Dr. Alan Wynne, and Sarah Urriste, Physician's Assistant.

Dr. Alan Wynne failed to take prompt action in a medical crisis by

misdiagnosing the heart attack as "gastritis", by ignoring medical symptoms, by not taking my complaints seriously and by abandoning me while I was in need of medical treatment in the midst of a life-threatening crisis with no access to other medical assistance.

Sarah Urriste, Physician's Assistant, failed to fulfill her duties by ignoring me while I was in the midst of a heart attack, leaving me unattended while she saw o it that patients with complaints of colds and other less serious symptoms were treated, and by allowing me to be taken off for a dental appointment while in the midst of a heart attack.

These staff persons acting on behalf of the Federal Medical Center failed to provide me with proper medical care as was their duty, and as a result of their negligent breach of their duty for care and their gross indifference to my medical needs in the middle of a life-threatening crisis, I suffered needless physical pain, mental anguish, and have been permanently disabled because of permanent damage to my heart.

Associate Waraden Mr. Helmen and Dr. P. Benantz, Hospital Administrator, came to see me and asked me many questions shortly after I was released from St. Marys Hospital. I assume that they were investigating the charges of negligence that I made, both publicly and to Federal

Medical Center officials, or at least trying to determine what happened to me. I discussed my complaints both with Paul Schultz, my case manager, and with Keith Farrell, my counselor, neither of whom had any resolutions to offer.

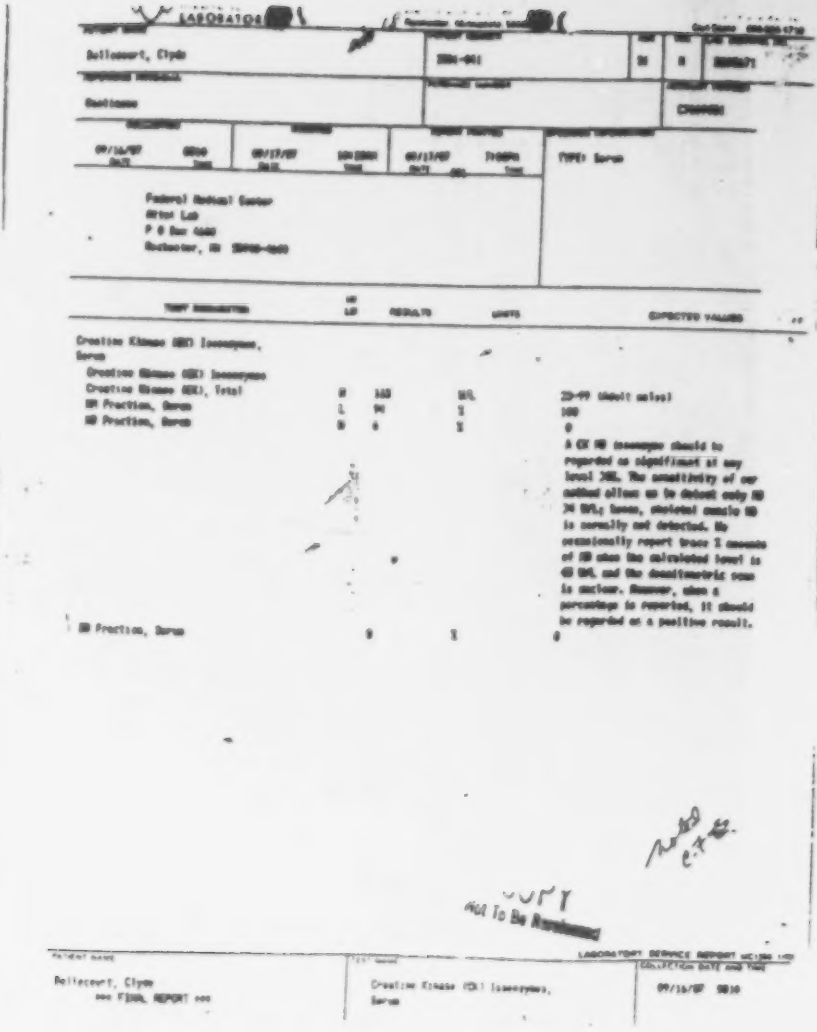
As resolution to this matter, I seek an investigation into the substandard medical care which I received and a full explanation of the causes. I also request compensation for the pain and suffering I endured, for the permanent injury to my health arising form damage to my heart which would not have occurred had I received timely medical care during the crisis I was suffering.

I further believe that the indifferent medical care to which I was subjected may have been the result of prejudice against me as an American Indian and/or due to my leadership role in the American Indian Movement.

Respectfully submitted,

Clyde H. Bellecourt
#02501-041
2429 18th Ave. S.
Minneapolis, MN 55404

cc: Douglas Hall, Esq.
Larry B. Leventhal, Esq.



Bellecourt, Clyde

Gastonia

09/16/97 0830

09/17/97

09/17/97

TYPE: Serum

Federal Medical Center
Attn: Lab
P O Box 4000
Rochester, MN 55903-4000

TEST DESCRIPTION	AB LO	RESULTS	UNITS	EXPECTED VALUES
Creatine Kinase (CK) Isoenzymes, Serum				
Creatine Kinase (CK) Isoenzymes				
Creatine Kinase (CK), Total	0	163	U/L	23-99 (Adult males)
MM Fraction, Serum	L	99	%	100
MB Fraction, Serum	0	0	%	0
				A CK MB isoenzyme should be regarded as significant at any level >0%. The sensitivity of our method allows us to detect only MB >4 U/L; hence, skeletal muscle MB is normally not detected. We occasionally report trace % amounts of MB when the calculated level is <3 U/L and the densitometric scan is unclear. However, when a percentage is reported, it should be regarded as a positive result.
BB Fraction, Serum	0	%	0	

Not To Be Reproduced

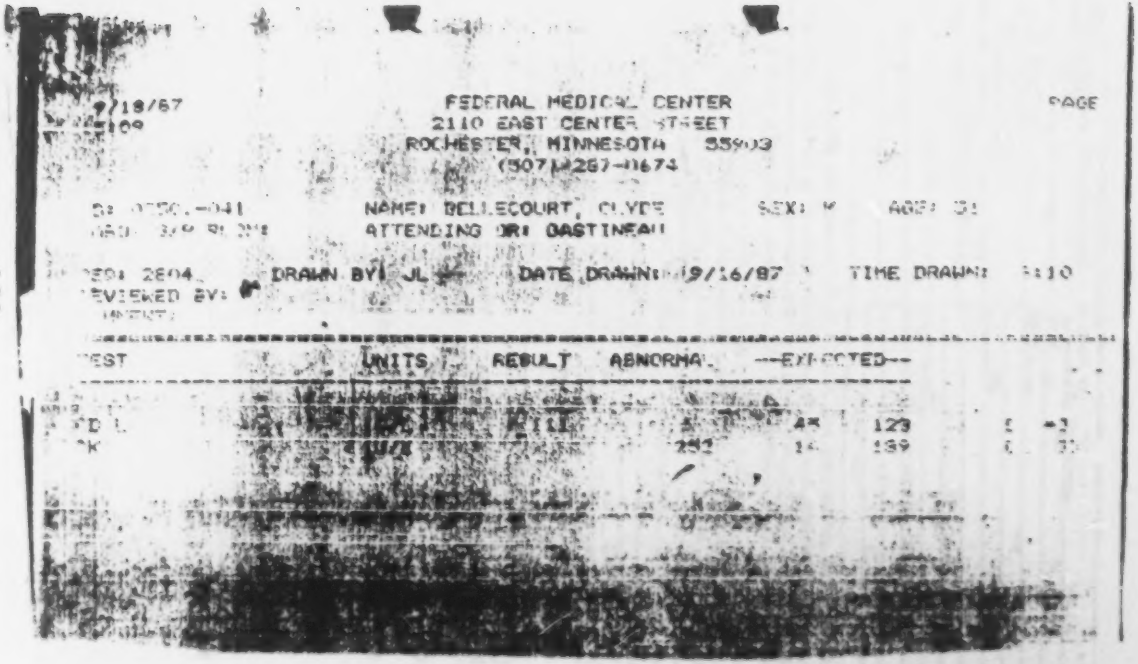
LABORATORY SERVICE REPORT

Patient name: Bellecourt, Clyde
*** FINAL REPORT ***

Test name: Creatine Kinase (CK) Isoenzymes, Serum

Collection date and time: 09/16/97 0830

BEST AVAILABLE COPY

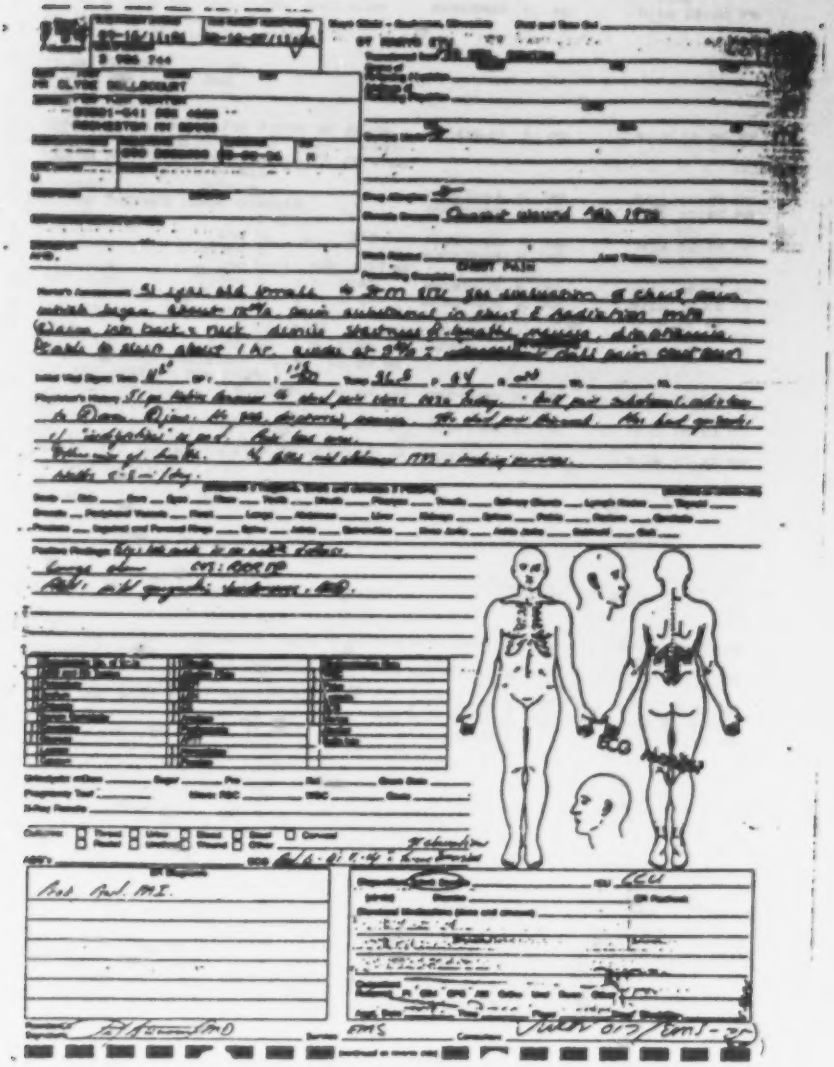


9/18/87 FEDERAL MEDICAL CENTER PAGE
2110 EAST CENTER STREET
ROCHESTER, MINNESOTA 55903
(507)287-4674

NAME: BELLECOURT, CLYDE SEX: M AGE: 31
ATTENDING DR: DASTINEAU

DRAWN BY: JL DATE DRAWN: 9/16/87 TIME DRAWN: 1110

TEST	UNITS	RESULT	ABNORMAL	--EXPECTED--	
WBC				4.5	12.9
RBC				4.2	6.3



SEQ	ORDER						TIME
1	9P BOTH ARMS ON ADMI...ON: THEN Q1SH UNTIL STABLE. THEN Q1 H 16. THEN Q4 H RR. TEMP ON ADMISSION: THEN Q4 H RECORD I&O DAILY WEIGHTS ALERT HR PVC LIMITS MIN 45 /MIN MAX 120					ANOSTHAN, K. MD	9/16 12:23 PM
2	BEGIN FULL LIQUIDS FOR FIRST 24 HOURS. THEN ADVANCE AS TOLERATED TO FULL DIET: 90 MEQ NA. SMALL MEALS. LOW CHOLESTEROL. FLUID: SIPS UNTIL STABLE					ANOSTHAN, K. MD	9/16 12:23 PM
3	BEDREST BEDPAN						
4	OXYGEN THERAPY NASAL CANNULA					ANOSTHAN, K. MD	9/16 12:23 PM
	OXYGEN	2 L/MIN				ANOSTHAN, K. MD	9/16 12:23 PM
5	D-5-W	250 ML		TKO		ANOSTHAN, K. MD	9/16 12:23 PM
6	HEPARIN	25000 U				ANOSTHAN, K. MD	9/16 12:23 PM
	D-5-W	250 ML	1000 UNIT/HR				
6	HEPARIN	5000 U	I.V.	STAT		ANOSTHAN, K. MD	9/16 12:23 PM
7	HEPARIN	10 U	I.V.	Q 6H		ANOSTHAN, K. MD	9/16 12:23 PM
9	COLACE	100 MG	PO	BID		ANOSTHAN, K. MD	9/16 12:23 PM
10	MOM	30 CC	PO		PRN	ANOSTHAN, K. MD	9/16 12:23 PM
11	MORPHINE ...	2.00 MG	I.V.	Q1CM		ANOSTHAN, K. MD	9/16 12:23 PM
	UNTIL PAIN RELIEVED, TOTAL 10.00 MG FOR ANALGESIA - PRN PAIN						
12	DA 'OCET-N-100 NON NARCOTIC PAIN	2 TAB	PO	Q 4H	PR	ANOSTHAN, K. MD	9/16 12:23 PM
13	TYLENOL NON NARCOTIC PAIN	650 MG	PO	Q 4H	PR	ANOSTHAN, K. MD	9/16 12:23 PM
14	OBTAIN ECG DURING CHEST PAIN PRIOR TO DR ADMINISTRATION.					ANOSTHAN, K. MD	9/16 12:23 PM

SEQ	ORDER						TIME
15	NITROGLYCERIN FOR CHEST PAIN	0.40 MG	SUBL	Q 5M	PRN	ANOSTHAN, K. MD	9/16 12:23 PM
16	VALIUM SEDATIVE (DAY TIME)	5.00 MG	PO	QID	PRN	ANOSTHAN, K. MD	9/16 12:23 PM
17	BLOOD AND BODY FLUID ISOLATION					ANOSTHAN, K. MD	9/16 12:24 PM
18	HALCION	0.25 MG	PO	QHS	PRN	ANOSTHAN, K. MD	9/16 12:24 PM
19	NIFEDIPINE	10.00 MG	SUBL			EMERGENCY	9/16 1:17 PM
	** MED ALREADY ADMINISTERED **						

COPY - MAYO CLINIC MEDICAL RECORD

REFERRAL SUMMARY
FEDERAL MEDICAL CENTER
ROCHESTER, MINNESOTA

INMATE NAME: BELLECOURT, CLYDE
REG. NO: 02501-041
DOB: 05-08-1936
DATE: October 27, 1987

Admission Diagnosis: Status post anterior wall MI.

History of Present Illness: The patient is a 51-year-old Native American, who developed substernal chest pressure on early a.m. of 09-16-1987. That morning he was admitted to St. Mary's Hospital and found to have had an acute anterior wall MI. His hospital course was complicated by continuing angina on a Nitroglycerine drip. He had a coronary angiogram done during this hospitalization that showed his left ventricular ejection fraction was 56%. He had 100% mid LAD lesion, 30% stenosis of the first obtuse marginal, 80% stenosis of the second obtuse marginal and 50% stenosis of the left posterior descending artery. He also had 30% stenosis of the mid right coronary artery. He completed his anterior wall MI and his course was uncomplicated after that except for what was felt to be some mild chest pressure, possibly angina that was relieved once he was started on Isordil.

The patient underwent an exercise MUGGA test prior to his discharge and was found to have apical dyskinesis with no change in his wall motion as exercise continued. His left ventricular ejection fraction went up from 50% to 57% with exercise. He was discharged to the Federal Medical Center on 09-24-1987.

The patient's risk factor for coronary artery disease were positive for family history in both his mother and his father. He also had positive smoking history and a moderately elevated cholesterol.

Past Medical History: Past medical history is significant for gonorrhea that was treated in 1948. He was involved in a motor vehicle accident in 1959 which resulted in a broken hand and head injury. He had hepatitis A in 1960. He suffered a gunshot wound to the abdomen in 1973. The bullet was removed in Winona, South Dakota. He had a transfusion during that surgery. He had a history of alcohol abuse and has had none in 16 years.

Medications at Time of Hospital Discharge:

Cardiazem 30 mg four times daily.
Isordil 5 mg four times daily.
Sublingual Nitroglycerine as needed.

Admission Physical Exam: Physical exam at the time of admission showed him to have a blood pressure of 94/66, a pulse of 64 which was regular.

HEENT: Unremarkable. His neck was supple. He had no carotid bruits. His

jugular venous pressure was normal.

Lungs: Clear to auscultation and percussion.

Heart: Normal S_1 with no S_3, S_4 or murmurs. The patient had normal pulses peripherally. He had an echymosis in the left groin status post his coronary angiogram.

Abdomen: Soft, nontender with normal bowel sounds. There were no masses present. He has a well healed midline surgical scar.

Rectal: Exam showed no prostatic nodules and was guaiac negative.

Admission Laboratory: Showed that the patient's electrolytes were within normal limits and his potassium was 4.4. His white count was normal. His hemoglobin was 14.4 with a normal differential. His urinalysis was clear. His chest x-ray showed changes consistent with an anterior lateral myocardial infarct, but showed no acute ischemic events at the time of his return. Chest x-ray showed that the heart was normal in size and that the pulmonary vasculature was normal in size and distribution. He had evidence of old healed rib fractures. There was no sign of acute pulmonary disease. His HIV status is negative and his hepatitis B surface antigen is negative.

Hospital Course: Mr. Bellecourt returned from St. Mary's on 09-24-1987. He was admitted to the Med/Surg Unit for post MI care. Since he had a submaximal stress test at the Mayo Clinic without signs of further ischemia it was decided to stop his Cardiazem and Isordil because he was complaining of headaches with Isordil. He was placed on 50 mg of Atenolol. This was in regards to various studies that have shown beta blockers have a beneficial effect in individuals after recent myocardial infarctions. Over the next few days he developed some chest discomfort that was vague and difficult to pin down. It occurred usually postprandially. He continued on an exercise program of walking and eventually also complained of some vague symptomatology after one or two laps that would go away if he continued to work. It was difficult to decide whether this was actually chest pressure versus shortness of breath due to deconditioning.

Because of the above concerns that suggested the possibility of post myocardial infarction angina he was restarted on the Cardiazem. He was maintained on the Atenolol. This created another problem in that the patient tended to have blood pressures that ran around 100 systolic to 108 systolic before his myocardial infarction. On the above medications the patient's systolic blood pressures were running in the 90's. Because he continued to have some of the above complaints his Cardiazem was eventually increased to 60 mg four times a day. On this dose the patient was having systolic blood pressures in the 80's. While this did not cause him major problems with dizziness he did feel generally fatigued and did at various times complain of some orthostatic hypotension symptoms. Also, increased doses of medication had no effect on his symptoms with exercise.

Because of these problems the patient's Cardiazem was eventually tapered and discontinued. ~~He continued to have problems with Hypotension~~. His symptoms that suggested the possibility of post MI angina in retrospect were apparently due to deconditioning. They became less and less frequent as his exercise

increased to greater levels. At this point he is able to go three or four miles around the track twice a day and is having no symptoms that are suggestive of angina. EKG's obtained with these symptoms also showed no signs of acute ischemia or changes from his post MI EKG.

Currently the patient is on 25 mg of Atenolol orally every day and has blood pressures that run in the upper 90's systolically. He denies symptoms of orthostatic hypotension.

Working Diagnosis: Status post myocardial infarction. It is doubtful that the patient has had post myocardial infarction angina. Most likely his symptomatology was due to deconditioning and breathlessness. With increased exercise the patient's symptomatology has progressively improved.

Current Medications:

1) Atenolol 25 mg orally every day.

Plan: The patient is doing remarkably well post anterior wall myocardial infarction. The plan at this time is to have a standard Bruce stress test done six weeks after his myocardial infarction. Specifically we are looking to be able to tell the patient specific exercise limitations. What his target heart rate should be when he exercises. This will give us an idea of what type of work he can do and when he can go back to work. Also since the patient is a Native American part of his religious ceremonies include spending time in the sweat lodge. Since this exposes the patient to fairly high temperatures, its important to know what his cardiac status is so that we can advise him on when he may return to the sweat lodge.

Wayne Thorne, M.D. — Date 10/24/87

DD: 10-27-1987
DT: 10-28-1987/ehp

ADMITTED 9/16/87 12:13 PM DISMISSED 9/19/87 4:06 PM
AGE 81 MALE
ADM. WT. 104.4 KG DIS. WT. 105.4 KG
HEIGHT 159 CM CONSULTANT

REASONS FOR ENTERING CCU
9/16 CLINICAL ISCHEMIC EPISODE/S: N. I. /PROBABLE N. I. SHORT, 9/16/87
9/ 1:00 AM

PREVIOUS DIAGNOSIS

DIAGNOSIS
9/17 ACUTE ANTERIOR INDETERMINATE MYOCARDIAL INFARCTION
9/17 CHEST PAIN/OTHER CHEST PAIN
9/16 CORONARY ARTERY DISEASE

INTERVENTIONS
9/17 10:16 AM CORONARY ARTERIOGRAPHIC STUDY
9/17 10:16 AM LV ARTERIOGRAPHIC STUDY

COMPLICATIONS

DISCHARGE STATUS
9/19 MONITORED MEDICAL FLOOR
9/19 STABLE, IMPROVED
9/19 NO ANGINA

DISCHARGE MEDICATIONS

TIME GIVEN						
9/19	12:41 PM	HEPARIN	10 U	I.V.	0 SH	
9/17	10:37 AM	COLACE	100 MG	PO	BID	
9/19	1:27 PM	MOM	30 CC	PO		PRN

DISCHARGE MEDICATIONS

TIME GIVEN						
9/17	4:10 AM	MORPHINE UNTIL PAIN RELIEVED. TOTAL 10.00 MG FOR ANALGESIA - PRN PAIN	2.00 MG	I.V.	Q4SH	
9/17	8:08 PM	DARVOCET-N-100 NON NARCOTIC PAIN	2 TAB	PO	Q 4H	PRN
9/17	3:10 AM	TYLENOL NON NARCOTIC PAIN	650 MG	PO	Q 4H	PRN
NOT GIVEN YET		OBTAIN ECG DURING CHEST PAIN PRIOR TO DRUG ADMINISTRATION.				
9/17	1:30 PM	NITROGLYCERIN FOR CHEST PAIN	0.40 MG	SUBL	Q 5M	PRN
9/16	8:48 PM	VALIUM SEDATIVE (DAY TIME)	5.00 MG	PO	BID	PRN
NOT GIVEN YET		HALCION	0.25 MG	PO	QHS	PRN
9/17	1:44 PM	VALIUM	5.00 MG	I.V.	Q1 H	PRN
9/19	10:47 AM	DILTIAZEM	30 MG	PO	Q6 H	
9/19	8:07 AM	KLOTRIX	20.00 MEQ	PO	BID	
9/19	9:00 AM	HEPARIN	10000 U	SUBQ	BID	

[redacted] Emergency Room Consultations and History [redacted]

Additional Nurse's Assessment: patient is [redacted] mild & guarded on [redacted] wt. IV infusing, TKO. Cardiac monitor shows NSR - rate [redacted] bpm. Lungs clear - [redacted]

[redacted] CVR status - to be admitted to [redacted]

NURSING DATA					PHYSICIAN'S ORDERS	PHYSICIAN SIGNATURE
MEDICATION	AMT GIVEN	ROUTE	TIME	SIGNATURE		

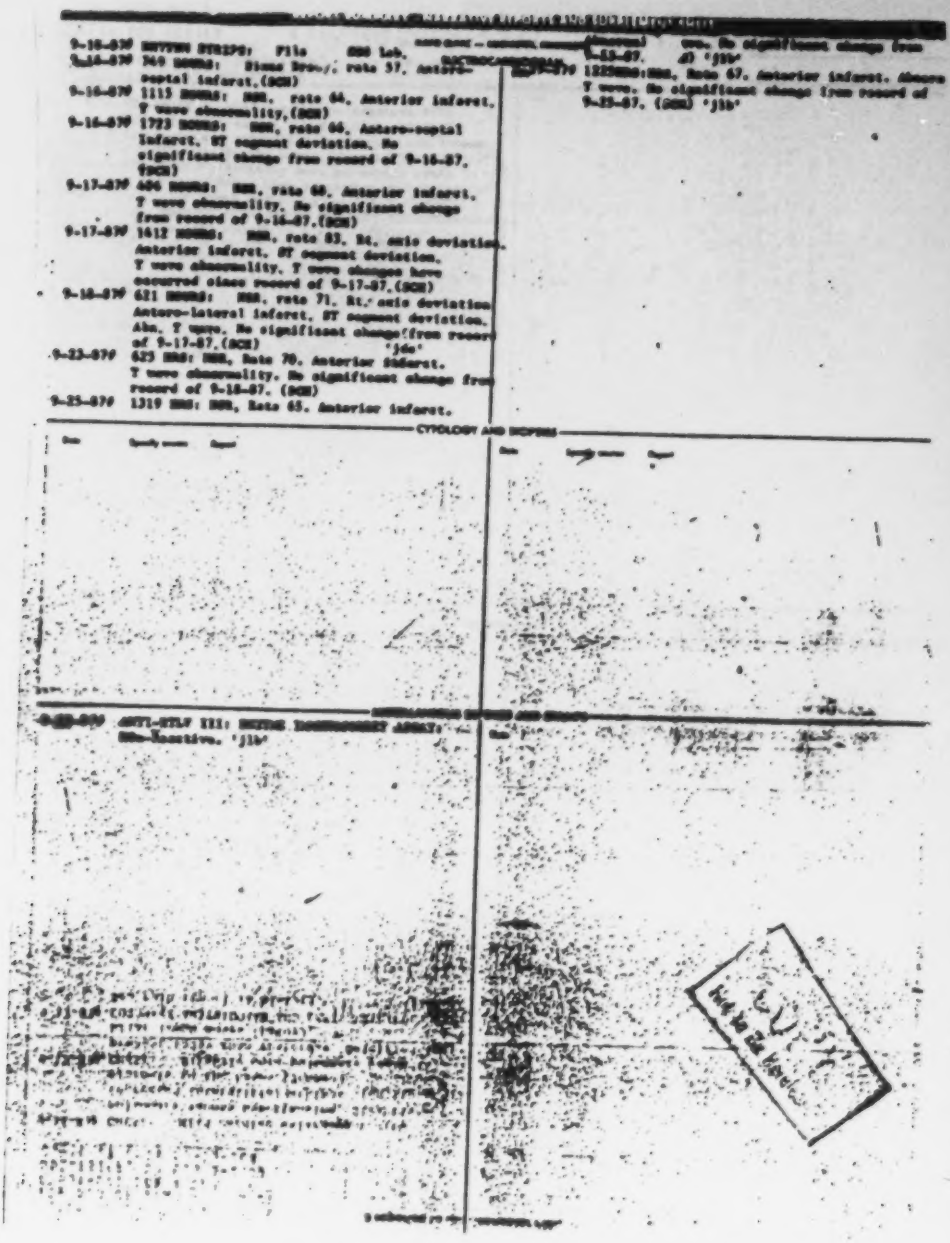
Additional Physician's History

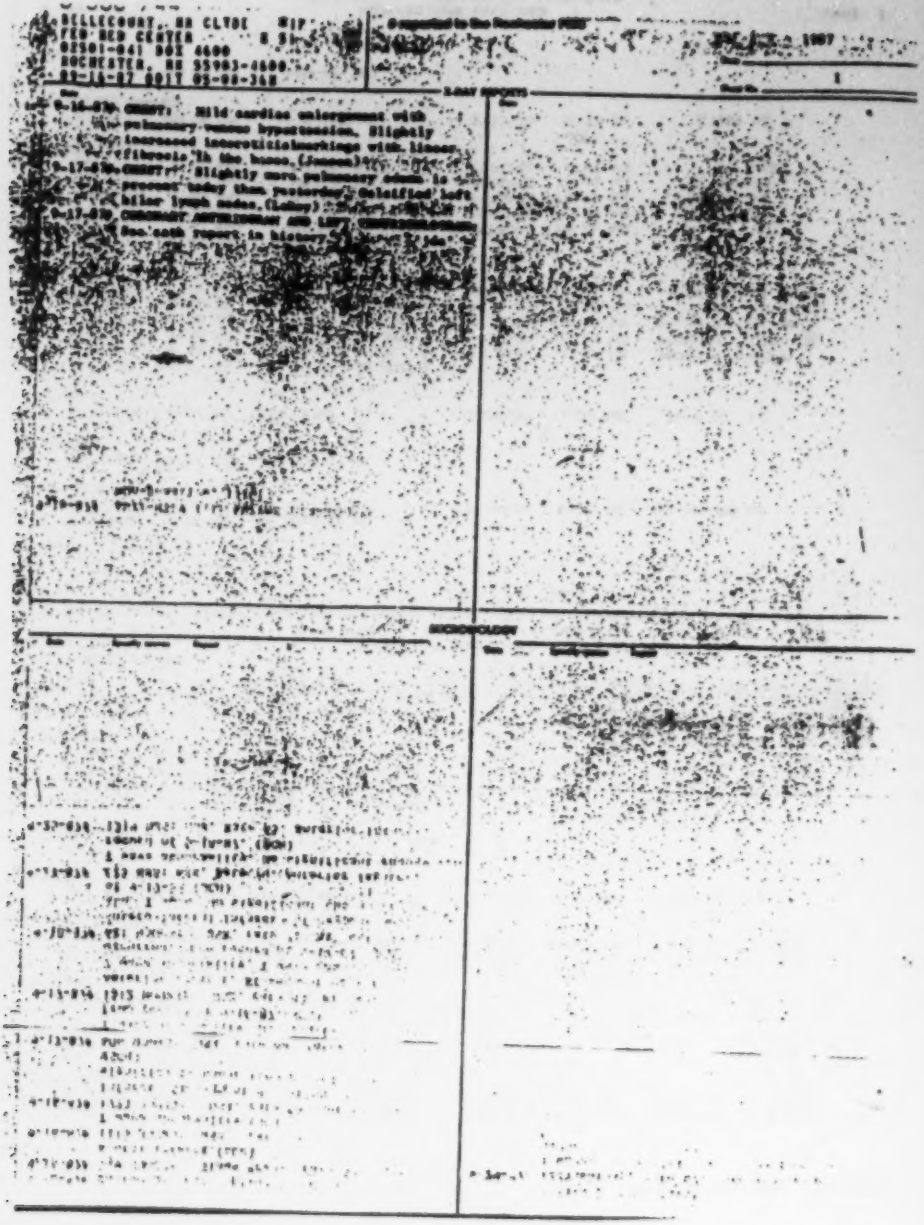
[redacted]

Emergency Room Course, Treatment and Disposition

[redacted]

COPY - [redacted]





MAYO CLINIC - ROCHESTER, MINNESOTA
MEDICATIONS RECEIVED

3 986 744
SELLSCOURT CLYDE

PAGE 1

COLACE											
9/17/87	10:57 AM	100 MG	PO								
DARVOCET-N-100											
9/17/87	12:18 AM	2 TAB	PO			9/17/87	3:08 PM	2 TAB	PO		
DILTIAZEM											
9/16/87	9:41 PM	30 MG	PO			9/17/87	4:44 AM		MG	HELD	
9/17/87	6:54 AM	30 MG	PO			9/17/87	10:57 AM	23	MG	PO	
9/17/87	3:08 PM	30 MG	PO			9/17/87	10:08 PM	30	MG	PO	
9/18/87	9:34 AM	30 MG	PO			9/18/87	10:54 AM	30	MG	PO	
9/18/87	9:37 PM	30 MG	PO			9/18/87	10:57 PM	30	MG	PO	
9/19/87	10:47 AM	30 MG	PO								
HEPARIN											
9/16/87	2:19 PM	9000 U		IV BOLUS		9/16/87	9:21 PM	1200 U		IV DRIP	
9/16/87	12:00 PM	7100 U		IV DRIP		9/17/87	6:52 AM	10 U		IV BOLUS	
9/17/87	10:58 AM	10 U		IV BOLUS		9/17/87	12:00 PM	26100 U		IV DRIP	
9/18/87	7:29 AM	9700 U		IV DRIP		9/18/87	10:59 AM	10000 U		SUBQ	
9/18/87	9:29 PM	10000 U		SUBQ		9/19/87	9:00 AM	10000 U		SUBQ	
9/19/87	12:41 PM	10 U		IV BOLUS							
ISORDIL											
9/18/87	1:36 PM	10.0 MG	PO			9/18/87	9:29 PM	10.0	MG	PO	
K-LOR											
9/17/87	2:27 PM	40.00 MEQ	PO								
KLOTRIX											
9/18/87	10:59 AM	20.00 MEQ	PO			9/18/87	9:32 PM	20.00	MEQ	PO	
9/19/87	8:07 AM	20.00 MEQ	PO								

400 SAINT MARYS HOSPITAL

MAYO CLINIC - ROCHESTER, MINNESOTA
MEDICATIONS RECEIVED

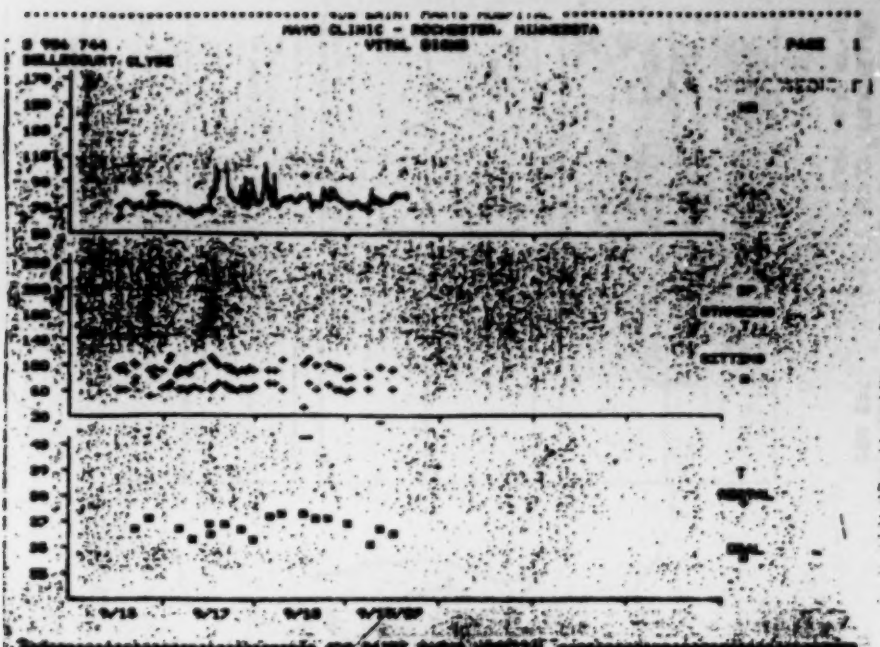
3 986 744
SELLSCOURT CLYDE

PAGE 2

LASIX											
9/19/87	1:27 PM	80 CC	PO								
MORPHINE											
9/16/87	12:29 PM	2.00	MG	IV BOLUS		9/16/87	12:40 PM	2.00	MG	IV BOLUS	
9/16/87	12:54 PM	2.00	MG	IV BOLUS		9/16/87	2:26 PM	2.00	MG	IV BOLUS	
9/16/87	4:29 PM	2.00	MG	IV BOLUS		9/16/87	6:19 PM	2.00	MG	IV BOLUS	
9/17/87	4:11 AM	2.00	MG	IV BOLUS							
NIFEDIPINE											
9/16/87	1:10 PM	10.00	MG	SUBL							
NITROGLYCERIN											
9/16/87	12:19 PM	0.40	MG	SUBL		9/17/87	1:20 PM	0.40	MG	SUBL	
NITROGLYCERIN											
9/16/87	12:00 PM	198.4	MG	IV DRIP		9/17/87	12:00 AM	3.9	MG	IV DRIP	
9/17/87	12:00 PM	82.4	MG	IV DRIP		9/18/87	7:29 AM	3.2	MG	IV DRIP	
RISPAN											
9/16/87	8:47 PM	30 CC	PO								
TYLENOL											
9/17/87	3:18 AM	650	MG	PO							
VALIUM											
9/16/87	6:19 PM	2.50	MG	IV BOLUS		9/16/87	8:49 PM	2.50	MG	IV BOLUS	
9/17/87	1:37 PM	2.50	MG	IV BOLUS		9/17/87	1:44 PM	2.50	MG	IV BOLUS	

COPY - MAYO CLINIC MEDICAL REC

400 SAINT MARYS HOSPITAL
MAYO CLINIC - ROCHESTER, MINNESOTA

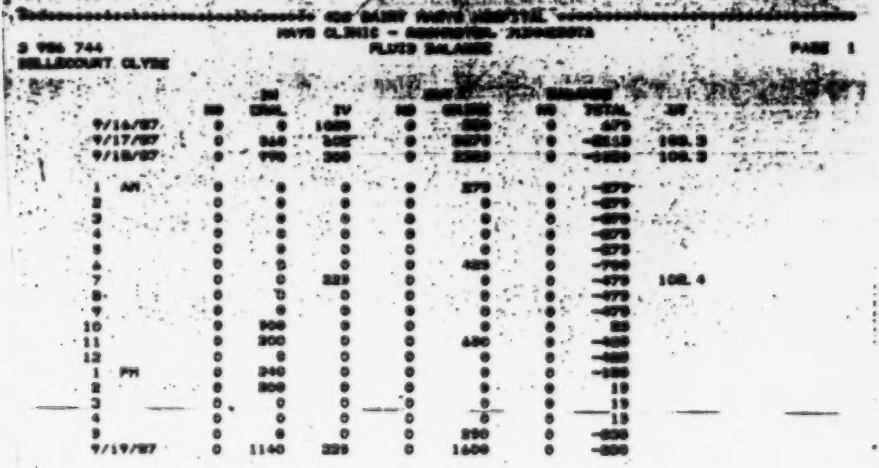


MAYO CLINIC - ROCHESTER, MINNESOTA

VITAL SIGNS

PAGE 1

9/16 9/17 9/18 9/19/87



MAYO CLINIC - ROCHESTER, MINNESOTA

FLUID BALANCE

PAGE 1

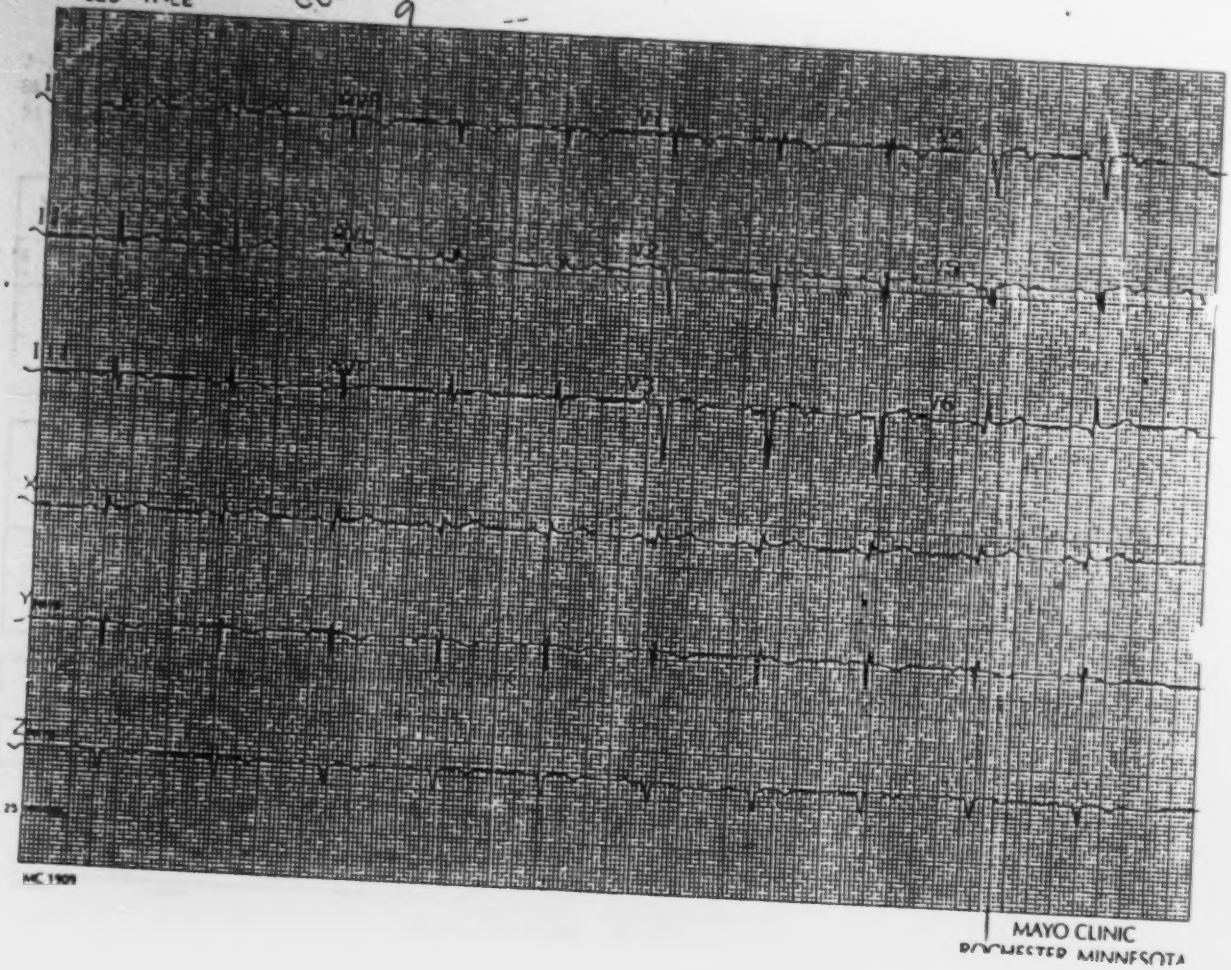
		IN			OUT			
		PO	ORAL	IV	PO	URINE	PO	TOTAL	BP
9/16/87		0	0	1000	0	350	0	475	
9/17/87		0	540	1200	0	2870	0	4610	100.2
9/18/87		0	720	300	0	2300	0	4200	100.2
1	AM	0	0	0	0	270	0	470	
2		0	0	0	0	0	0	470	
3		0	0	0	0	0	0	470	
4		0	0	0	0	0	0	470	
5		0	0	0	0	0	0	470	
6		0	0	0	0	420	0	890	
7		0	0	320	0	0	0	1210	100.4
8		0	0	0	0	0	0	1210	
9		0	0	0	0	0	0	1210	
10		0	300	0	0	0	0	1510	
11		0	300	0	0	480	0	1990	
12		0	0	0	0	0	0	1990	
1	PM	0	240	0	0	0	0	2230	
2		0	300	0	0	0	0	2530	
3		0	0	0	0	0	0	2530	
4		0	0	0	0	0	0	2530	
5		0	0	0	0	350	0	2880	
9/19/87		0	1140	320	0	1600	0	4880	

I-906-744 (HC L2) 21030 16 SEP 1987
ELLECOURT, CLYDE 249 HRS
11-YR OLD, MALE
MAYO CLINIC
ROCHESTER, MINNESOTA

PREVIOUS RECORD
51-YR OLD MALE
1115 HRS
I
II
III
AVR
AVL
AVF
V1
V2
V3
V4
V5
V6
X
Y
Z
HAYO CLINIC
ROCHESTER, MINNESOTA

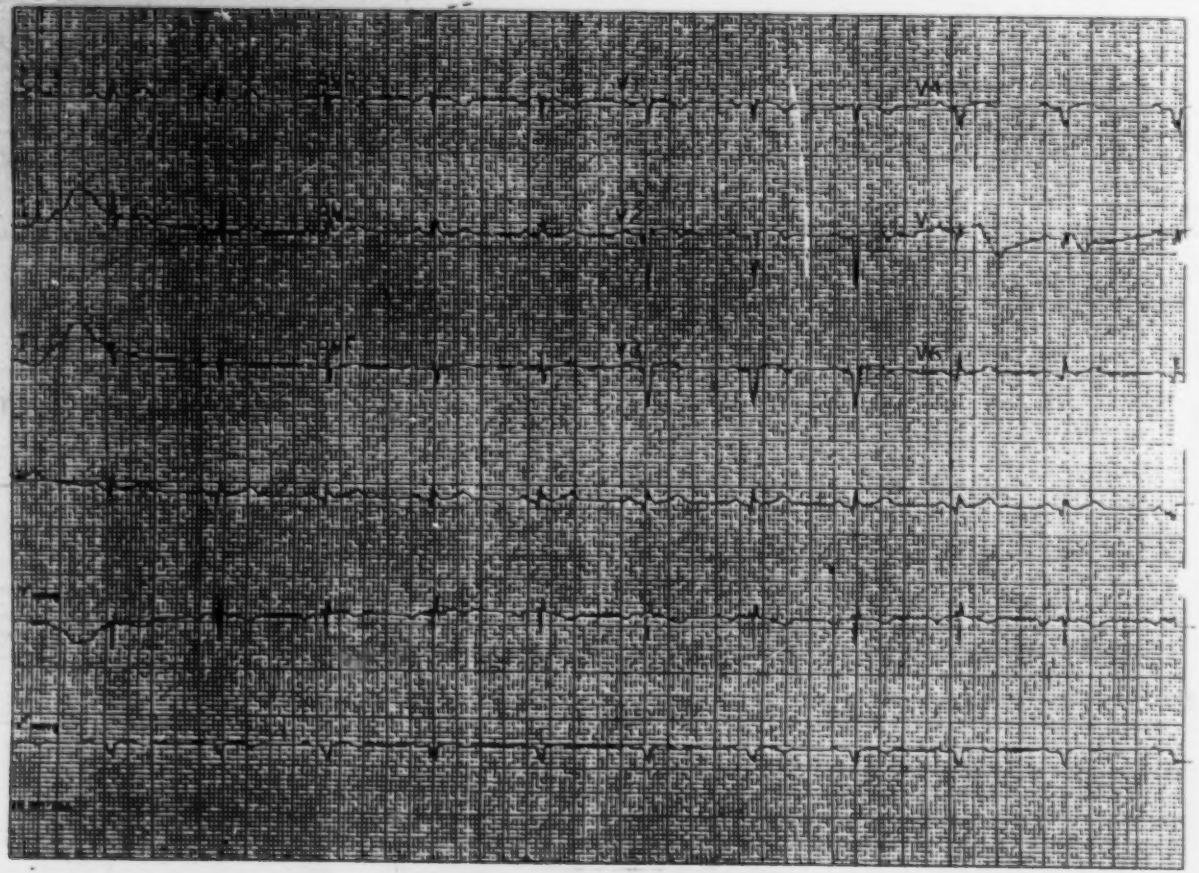
986-744 ST M ER-
LLECOURT, MR CLYDE
-YR OLD MALE

3 16 SEP 1987
1115 HRS

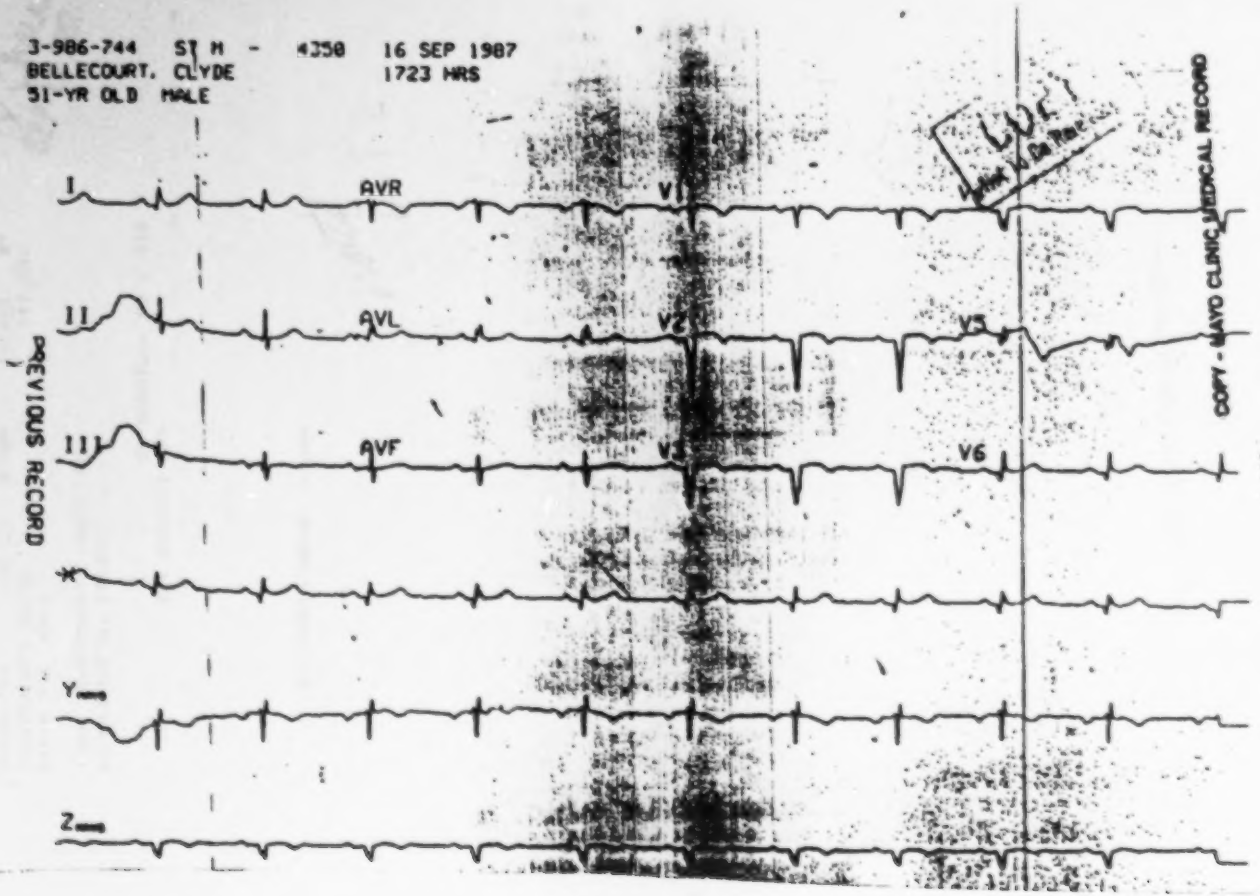


COPY - MAYO CLINIC MEDICAL RECORD

3-986-744 ST M - 4350 16 SEP 1987
BELLECOURT, CLYDE 1723 HRS
51-YR OLD MALE



COPY - MAYO CLINIC MEDICAL RECORD


3-986-744 ST M - 4350 16 SEP 1987
BELLECOURT, CLYDE 1723 HRS
51-YR OLD MALE
I
II
III
AVR
AVL
AVF
V1
V2
V3
V5
V6
PREVIOUS RECORD
COPY - MAYO CLINIC MEDICAL RECORD

3-786-744 ,MC L2 21050 14 SEP 87
BELLECOURT, CLYDE 749 HRS
51-YR OLD MALE

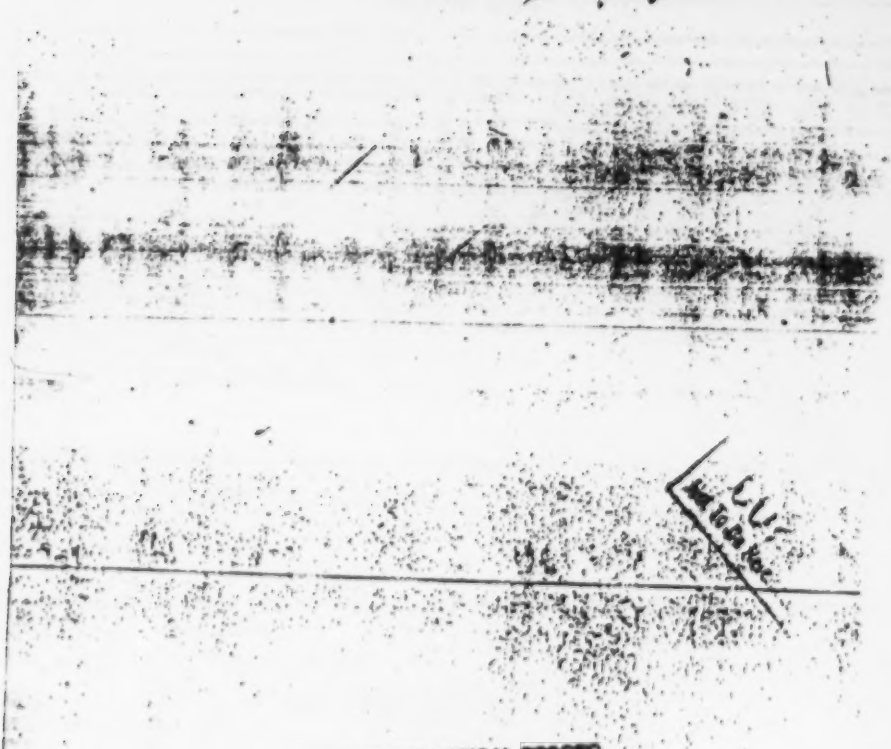
SINUS BRADYCARDIA, RATE 57
ANTERO-SEPTAL INFARCT

SC HAMMILL, MD / 910

Dr. Chaine
SEP 18 1987

ELECTROCARDIOGRAM

noted
W.T.



COPY - MAYO CLINIC MEDICAL RECORD

Saint Marys Hospital
1216 Second Street SW
Rochester, MN 55902

Rochester Methodist Hospital
201 West Center Street
Rochester, MN 55902

NURSING REFERRAL

Regarding:
Patient's Name Clyde Bollerud
Address FMC
Rochester
Telephone _____ Birthdate 05-15-36
Mayo Clinic # 398-744
Mayo Clinic Consultant A. Jan Clements
Name, First & last
Cardiac
Mayo Clinic Section
Local M.D. _____

Referral from: RMH ✓ SMH
Station 4E Telephone 285-6387
Referral to: FMC
Name
Rochester MN
City State Zip
287-0674 Yes No 8
Telephone # Called Person Contacted
Hosp. Adm. Date 9-16-87 Disch. Date 9/20/87
Nurse's Signature

Primary Reason for Hospitalization/Surgical Procedure MI - cardiac catheterization - PTCA
Other Health Problems _____
This nursing referral has been discussed with the patient and/or family. Discussion centered on _____
return to FMC
(reason for referral)

While the patient was hospitalized and under medical care, the following information was utilized in providing nursing care and preparing the patient for his dismissal from the hospital:

Vision wears glasses
Hearing within normal limits
Speech normal
Dentures _____
Prostheses none
Dental Status short brown

Mobility (ambulation - out-of-bed, assistance needed - degree of independence)
independent
Cardiac rehab following for exercise protocol.
Stage II Day 9 of 9 on 9/24/87

Nutrition (fluid restriction, diet, appetite, assistance needed, food allergies, diet instruction, etc.)
low Na
low cholesterol

Trial To Go Results

Elimination (bowel/bladder program, catheter size and date changed, last BM, laxatives, continence, urine testing, etc.)
continent of bowel & bladder
Last BM

Personal Hygiene (condition of skin, allergies, self-care or needs assistance with care of skin, hair, feet, teeth, etc.)
independent
WALKS W/ ASSISTANCE
PERFORMS OWN SELF CARE

(continue on page 2 A-120

SMH-11987-1/RMH-601-009-1

BEST AVAILABLE COPY

♥♥♥♥♥♥♥♥♥♥♥♥♥ CATHETERIZATION LABORATORY ♥♥♥♥♥♥♥♥♥♥♥♥♥
MAYO CLINIC - ROCHESTER, MINNESOTA

3-906-744 4243
BELLECOURT, Clyde

FINAL REPORT

Dec 17, 1987
PAGE 1

AGE: 51 years HEIGHT: 180 cm WEIGHT: 106.0 kg BSA: 2.30 m2 RESPIRATOR RX:
PROCEDURE STARTED: Dec 17, 1987 3:36 PM DAY CARE ADMIT: Inpat
REFERABLE MD: Vlietstra, Ronald E. RESIDENT: Hurley, Dominic

PROCEDURE TYPES
1 Emergency left ventricular and coronary angiogram.

FINAL DIAGNOSIS
1 Moderate coronary artery obstructive disease
2 Mild LV dilatation
3 Mild LV hypokinesis
4 Mild mitral valve incompetence

TIME HR # POSITION PRESSURES SO2 FO2 FSO2 FCO2
0:03 72 1 Ao root a
0:04 72 2 LV
0:05 68 Biplane cine - Lao angle - LAO
0:05 82 3 LV
84 3 Ao aorta
0:07 70 Coronary artery injections.

HEMODYNAMICS SUMMARY
1 Moderate increased LVEDP

LEFT VENTRICULOGRAPHY SUMMARY
1 Abnormal biplane LV angiogram with mild LV dilatation and mild mitral regurgitation.
2 The LV ejection fraction is 56% (regular beat).
3 There is akinesis of the anterolateral and apical septal segments.
4 There is dyskinesis of the apical segment.

CORONARY SUMMARY
1 Coronary artery dominance is left. Normal left main coronary artery.
2 The middle left anterior descending is 100% occluded. Distal segment is poorly visualized. Numerous collaterals from first anterior septal branch.
3 The first obtuse marginal branch is 70% obstructed by a single discrete lesion. Distal segment is normal size. diseased.
4 The second obtuse marginal branch is 80% obstructed by a single discrete lesion. Distal segment is small sized. diseased.

CONTINUED ON NEXT PAGE

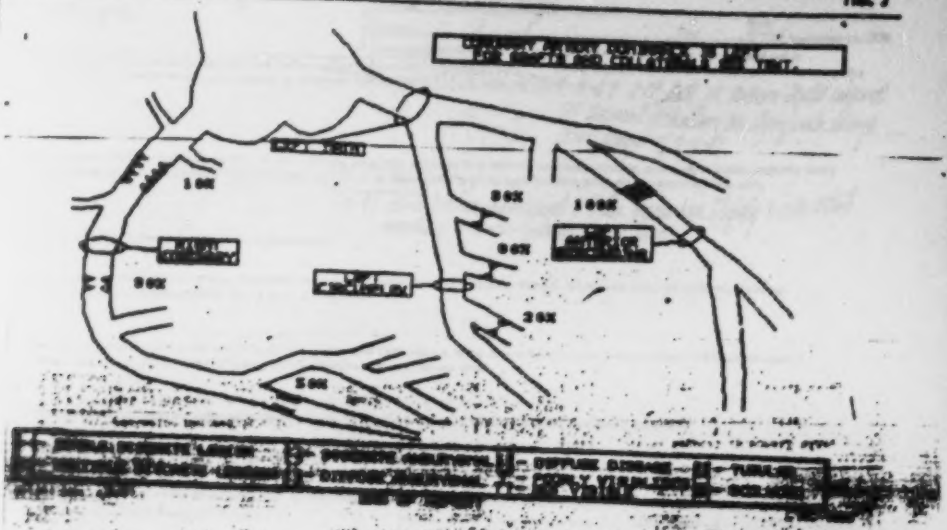
♥♥♥♥♥♥♥♥♥♥♥♥♥ CATHETERIZATION LABORATORY ♥♥♥♥♥♥♥♥♥♥♥♥♥
MAYO CLINIC - ROCHESTER, MINNESOTA

3-906-744
BELLECOURT, Clyde

FINAL REPORT

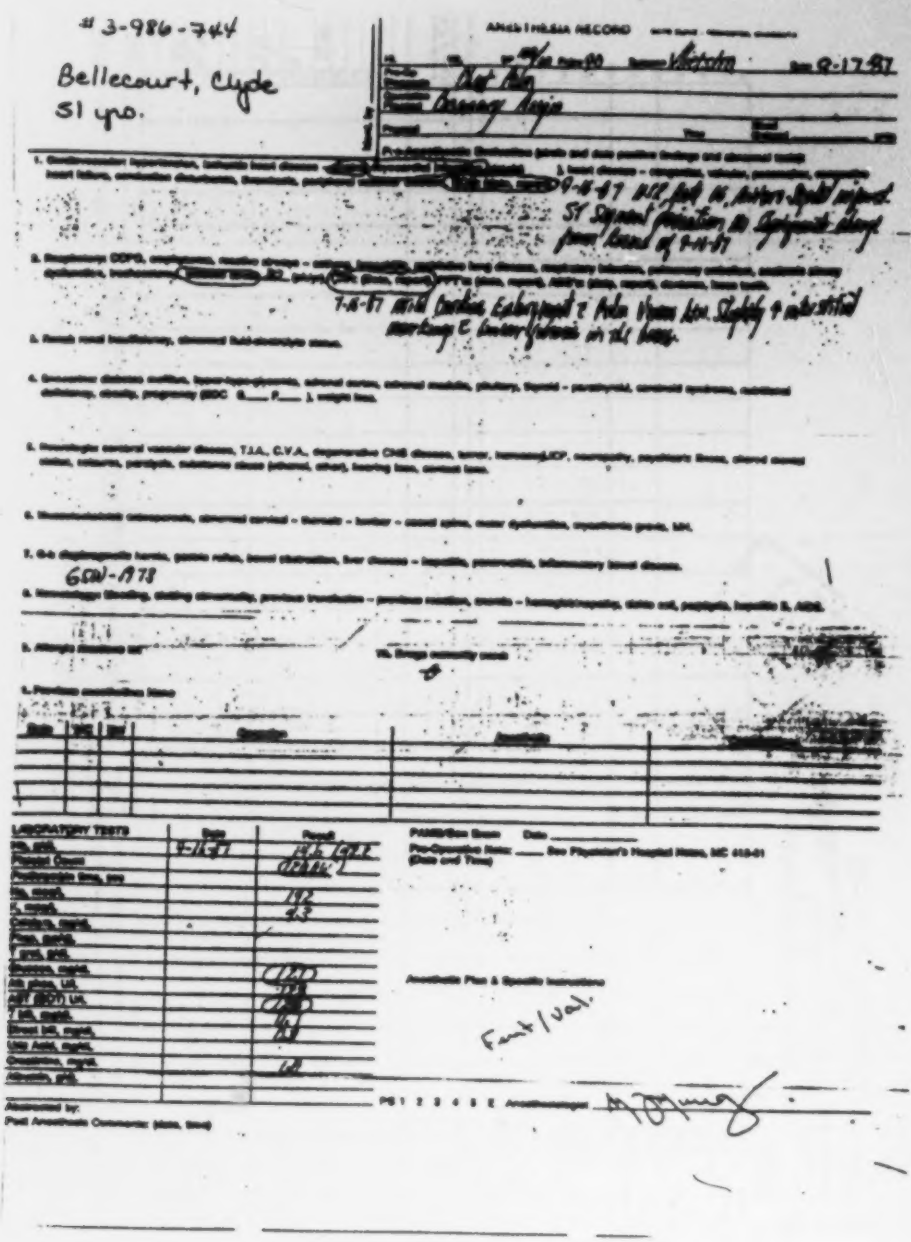
CORONARY SUMMARY(CONT.)
5 The third obtuse marginal branch is 80% obstructed by a single discrete lesion. Distal segment is normal size. diseased.
6 The left posterior descending artery is 90% obstructed by a tubular lesion. Distal segment is normal size. diseased.
7 The proximal right coronary artery is 30% obstructed by diffuse disease.
8 The middle right coronary artery is 70% obstructed by multiple discrete lesions. Distal segment is normal size. diseased.

Vlietstra, Ronald E., M.D. Hurley, Dominic, M.D. CONTINUED ON NEXT PAGE MC-381



COPY
Held To Be Readily

COPY - MAYO CLINIC MEDICAL RECORD



3-986-744

Bellecourt, Clyde
51 yrs.

ANESTHESIA RECORD

9-17-87

Dist Hip
Drainage Angio

9-8-87 BCC fell on bottom, Right injured. ST Segment elevation in Septum & Apex. Normal level of 9-11-87

9-8-87 mild tachea, Enlargement & Pain Upon Lat. Shifting & substernal warmth & tenderness in the lungs.

6GW-178

Date	Time	Init	Question	Answer	

LABORATORY TESTS

	Date	Result
Hb, g/dL	9-16-87	13.5
Hct, %		40.6
Platelet Count		
Prothrombin time, sec		
Na, mmol/L		142
K, mmol/L		4.3
Cl/HCO3, mmol/L		
Ca, mg/dL		
P, mg/dL		
Glucose, mg/dL		
Bili, total, U/L		0.8
SGOT (AST) U/L		20
T bili, mg/dL		0.6
Direct bili, mg/dL		0.3
Uric Acid, mg/dL		
Creatinine, mg/dL		1.0
Albumin, g/dL		

PASS/Stm Score ____ Date ____

Pre-Operative Note: ____ See Physician's Hospital Notes, MC 413-01
(Date and Time)

Anesthetic Plan & Specific Instructions

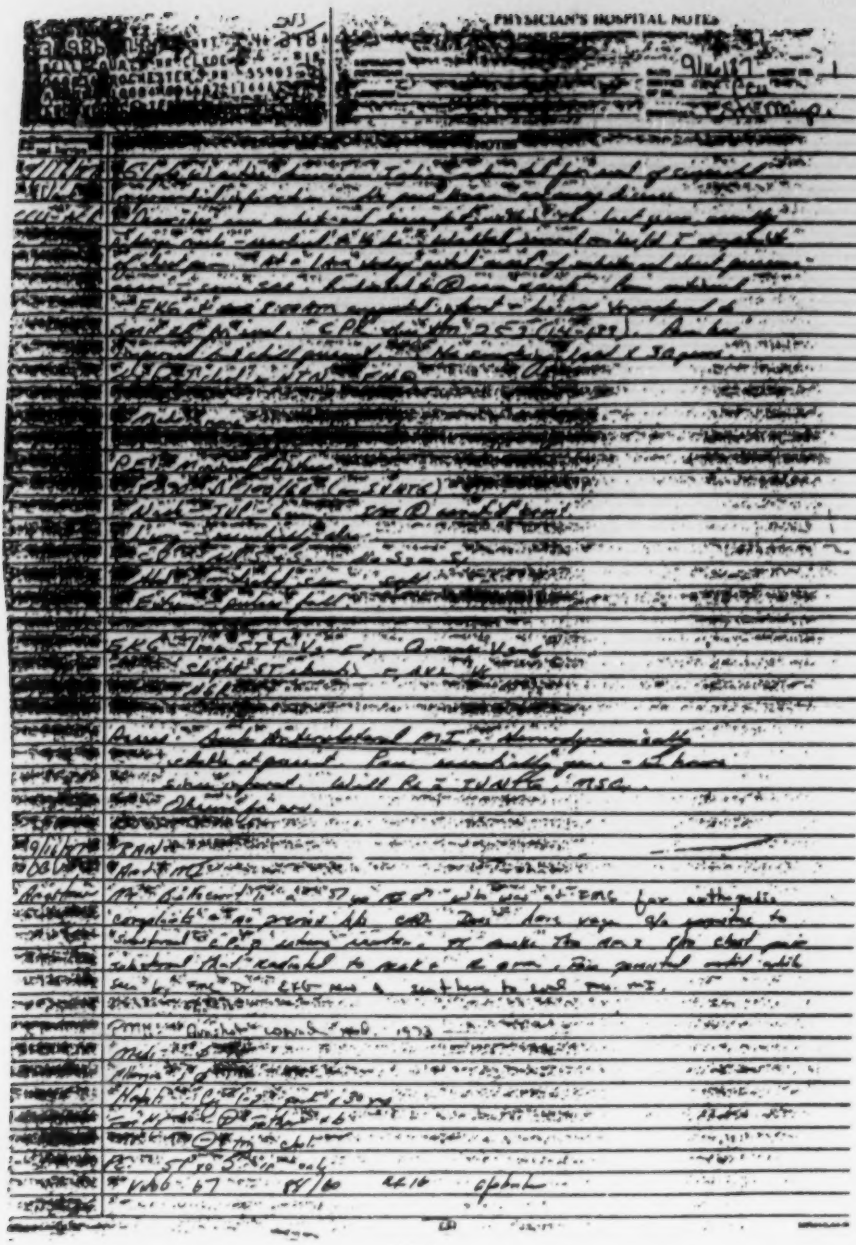
Fent/Val.

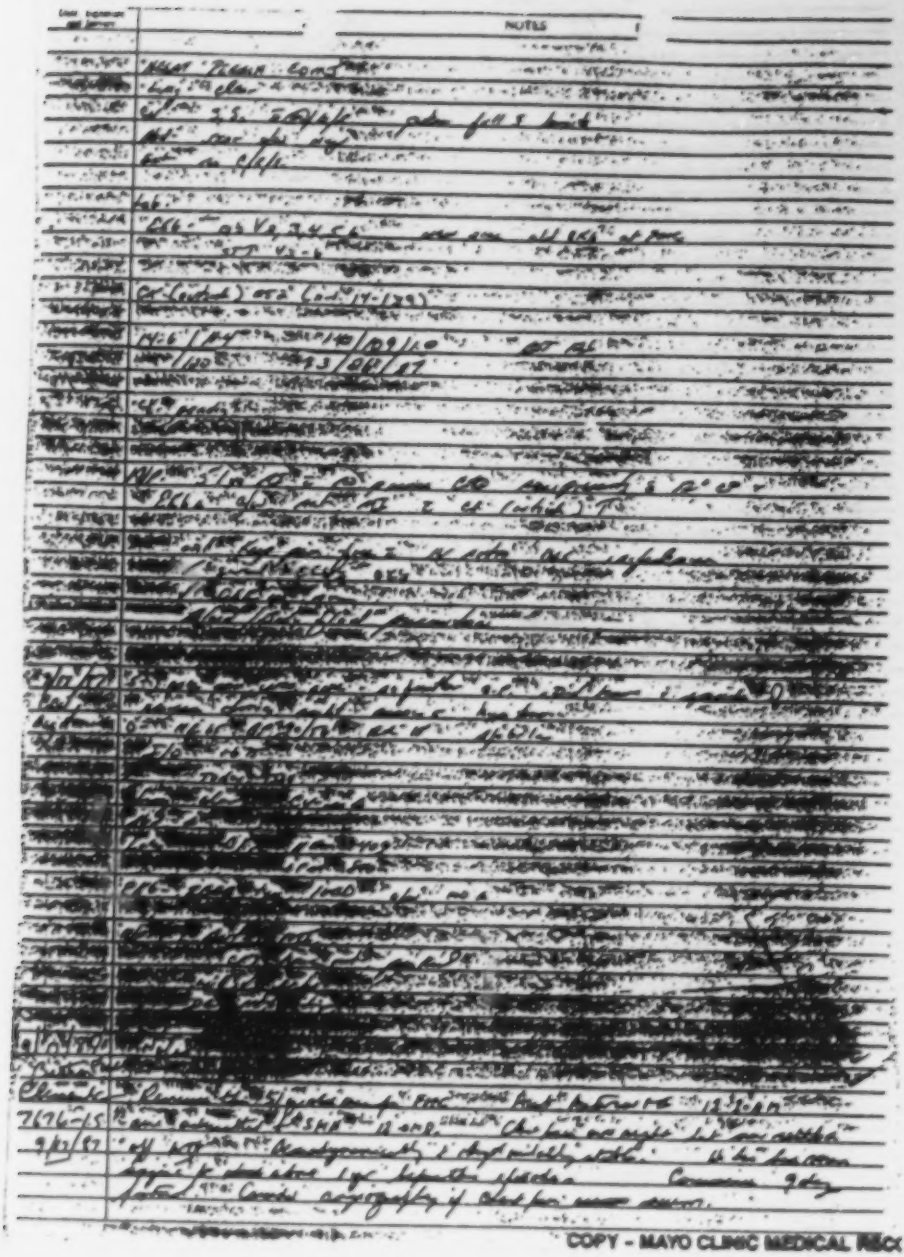
PS: 1 2 3 4 5 E Anesthesiologist

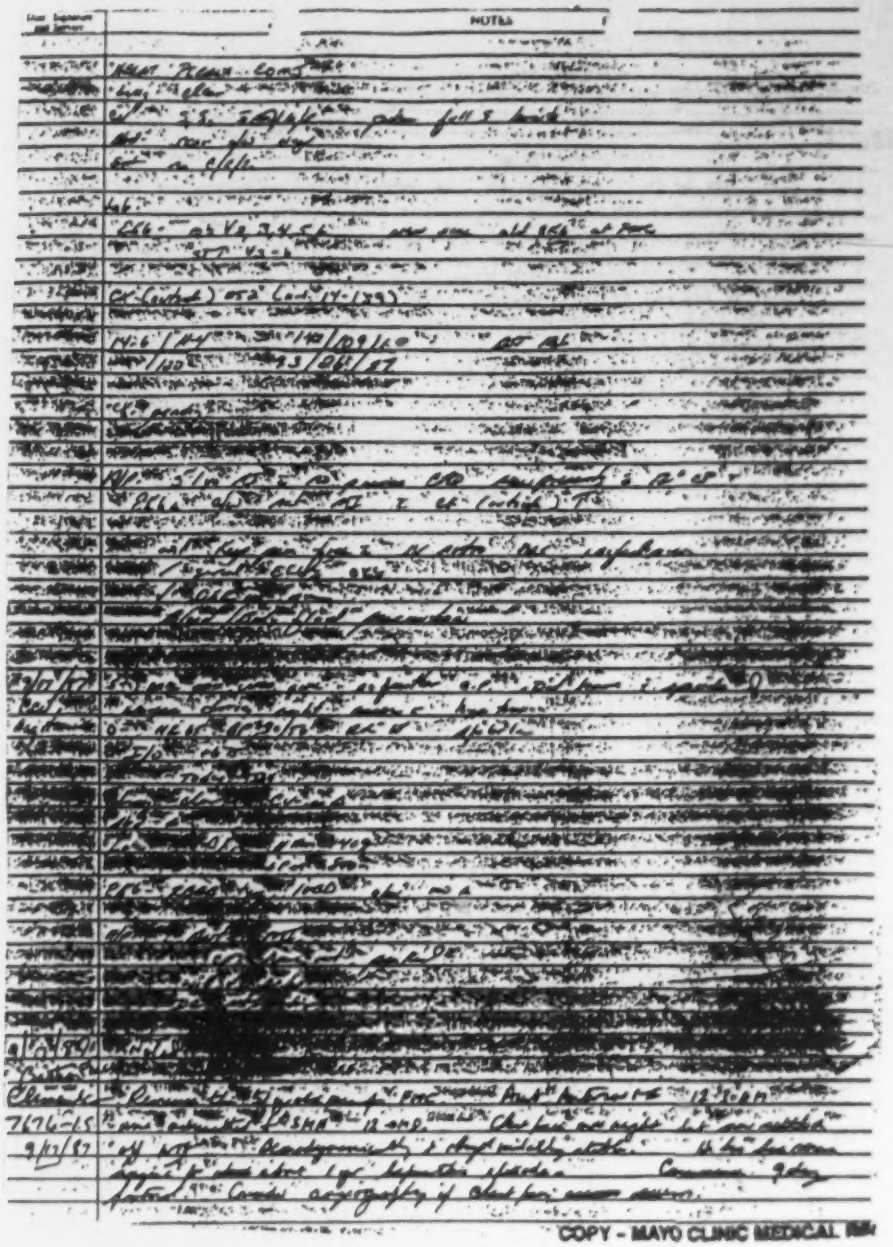
Approved by:
Post Anesthesia Committee (date, time)

COPY
MAYO CLINIC MEDICAL RECORD

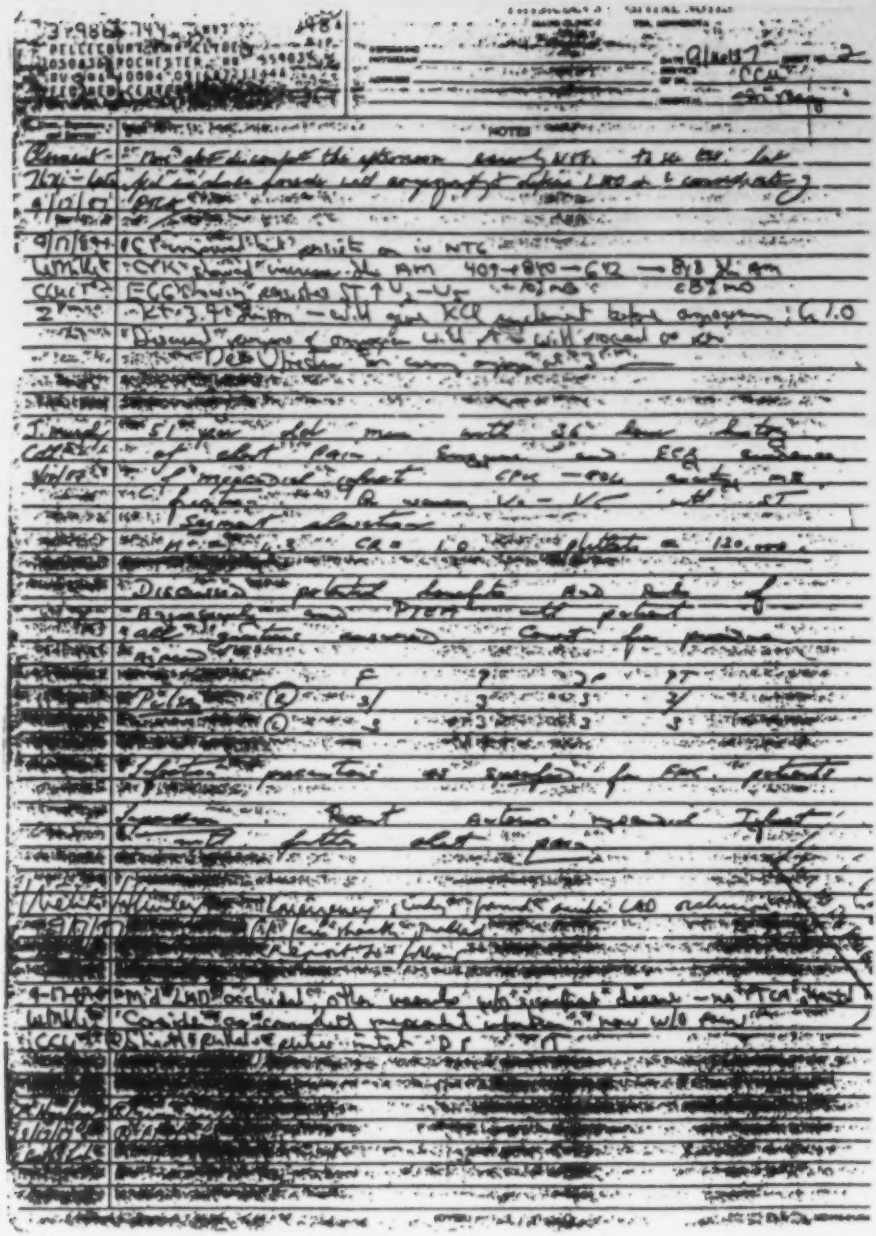
J-986-244 FMC L2
BELLECOURT, CLYDE
51-YR OLD MALE
21858 16 SEP 1987
749 HRS
I
II
III
AVR
AVL
AVF
V1
V2
V3
V4
V5
V6
X
Y
Z
A-123
PREVIOUS RECORD
COPY - MAYO CLINIC MEDICAL RECORD

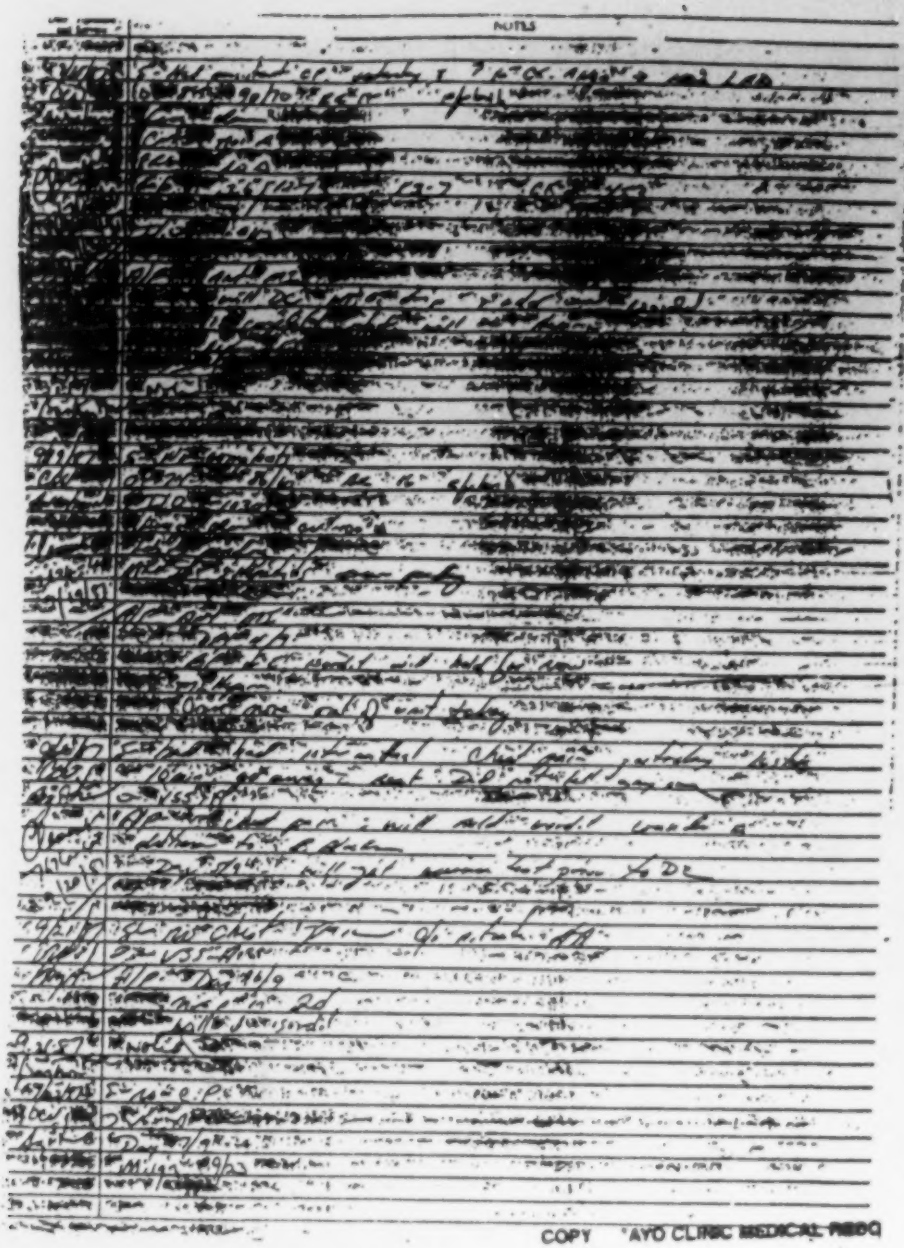

PHYSICIAN'S HOSPITAL NOTES


NOTES
COPY - MAYO CLINIC MEDICAL REC



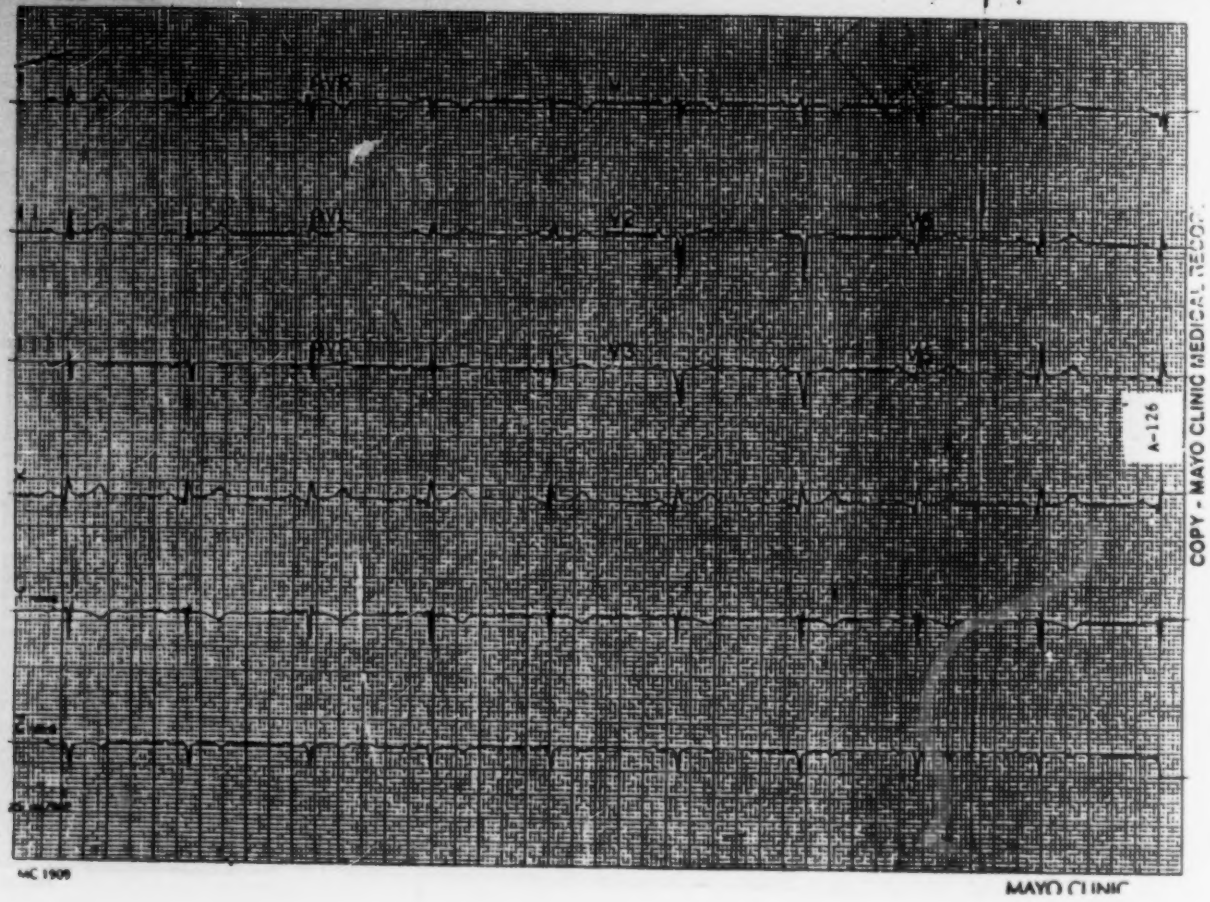
COPY - MAYO CLINIC MEDICAL





COPY AYO CLINIC MEDICAL RECO

3-986-744 FMC L2 21050 16 SEP 1987
BELLECOURT, CLYDE 749 HRS
51-YR OLD MALE

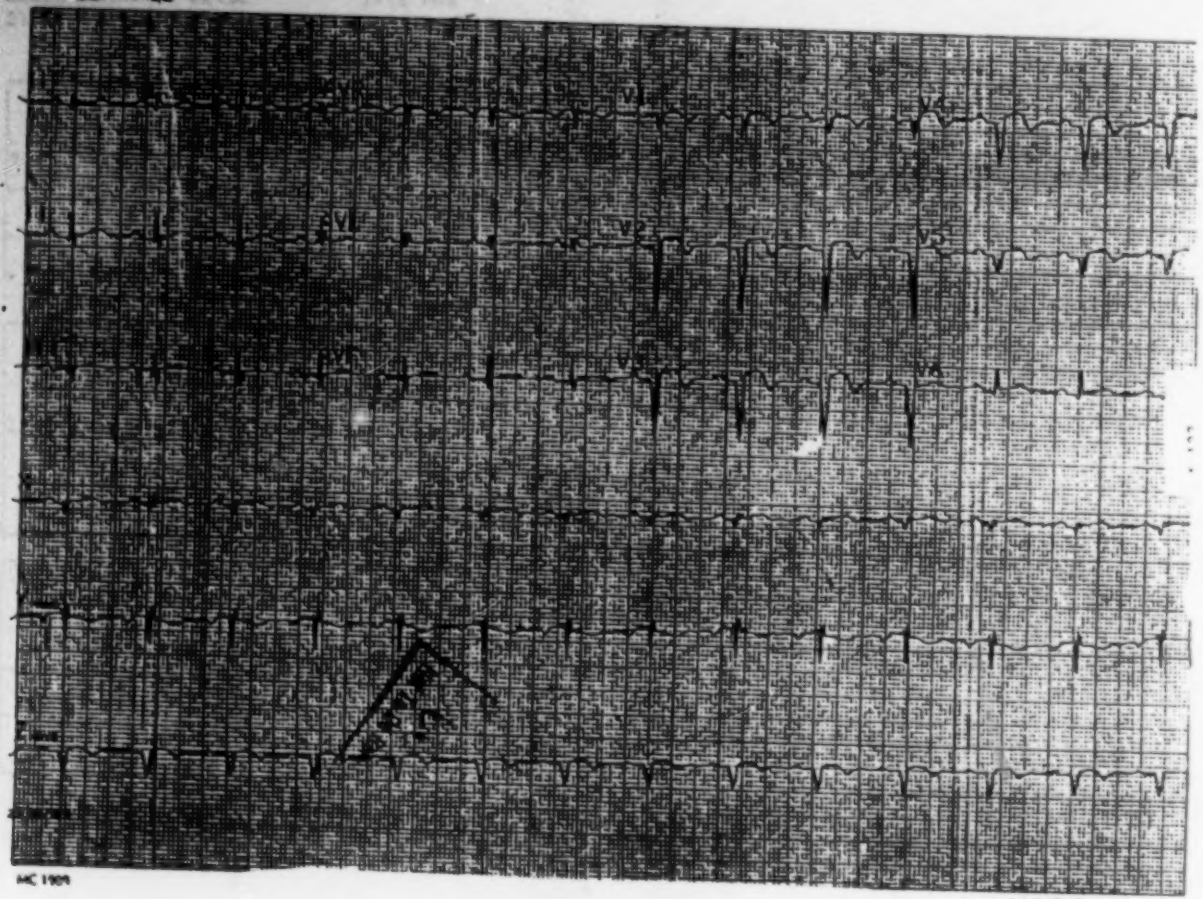


FMC 1909

MAYO CLINIC

COPY - MAYO CLINIC MEDICAL REPORT

3-986-744 ST M - 4350 17 SEP 1987 =9
BELLECOURT, MR CLYDE 1412 HRS
51-YR OLD MALE



MC 1909

MAYO CLINIC

3-986-744 ST H - 4350 17 SEP 1987
BELLECOURT, MR CLYDE 1412 HRS
51-YR OLD MALE

X_r

Y_{MAYO}

Z_{MAYO}

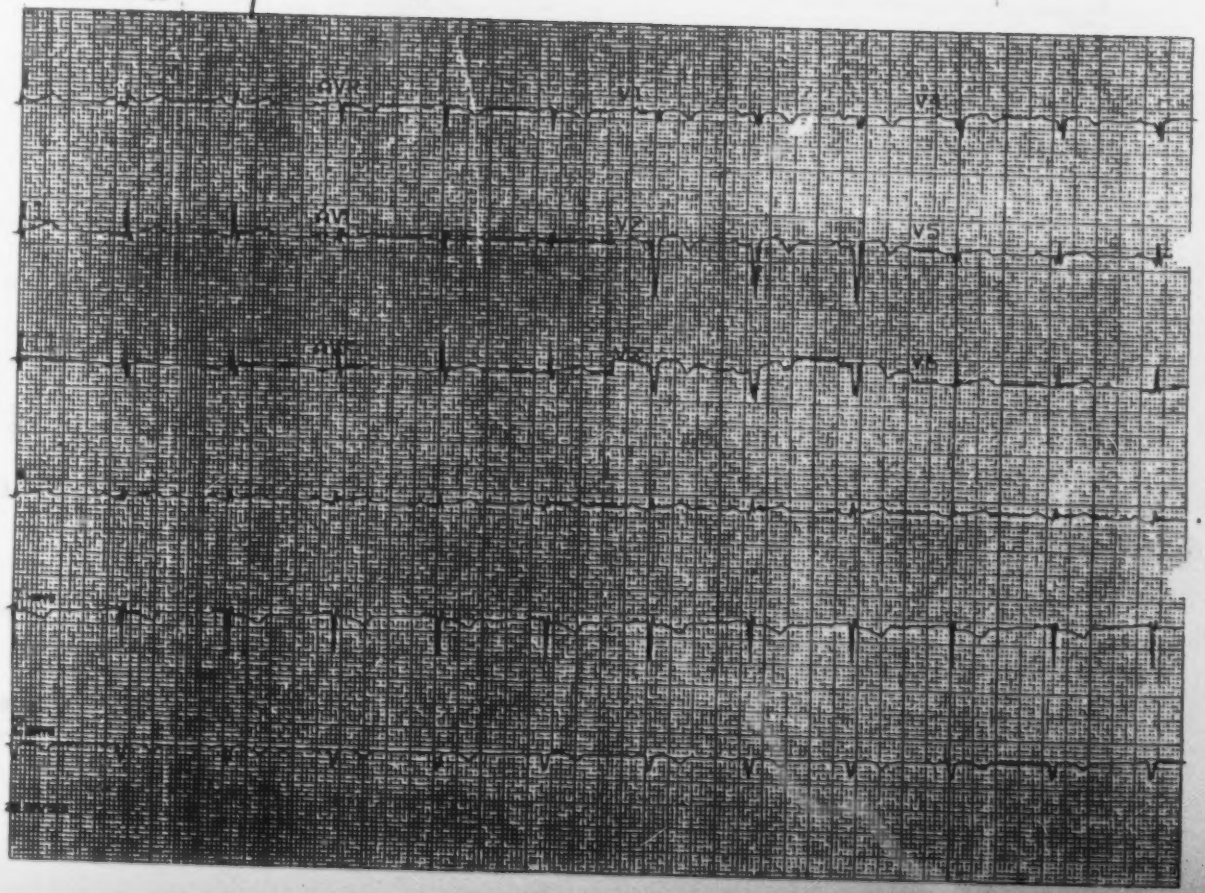
COPY - MAYO CLINIC MEDICAL RECORD

MAYO CLINIC
ROCHESTER, MINNESOTA

PREVIOUS RECORD
COPY - RADIO CLINIC MEDICAL RECORD
3-906-744 ST H - 4350 17 SEP 1987
BELLECOURT, MR CLYDE 1412 HRS
51-YR OLD MALE
I
II
III
AVR
AVL
AVF
V1
V2
V3
V5
V6
X
Y
Z
VIOUS RECORD

COPY - MAYO CLINIC MEDICAL RECO

3-986-744 ST H - 4358 17 SEP 1987
BELLECOURT, MR CLYDE 406 HRS
51-YR OLD MALE



J-986-744 ST M -
BELLECOURT, MR CLYDE
51-YR OLD MALE
4350
17 SEP 1987
496 HRS
PREVIOUS RECORD
AVR
AVL
AVF
V1
V2
V3
V4
V5
V6
I
II
III
X
Y
Z
PREVIOUS RECORD 021-A
COPY - MAYO CLINIC MEDICAL RECORD

CELLCOURT, . .LYCE -MD
050835 ROCHESTER, PA 55903
RU CN4 19764 091087 1144
FED RED CENTER

HEALTH MAINTENANCE PATTERNS

Known allergies: NO KNOWN Allergies

Usual drug use (alcohol, tobacco, other): smoke 1 ppd. X 25 yrs

Current living arrangements (roommates, significant other): currently at FRC

E. M. Signature: D Mackey Date: 9-14-87

PATIENT PROBLEM LIST

Admitting Diagnosis: _____

Date Initiated	No.	PROBLEM DESCRIPTION (Include onset/ signature)	Resolved Date	Resolved Name
9/14	1			
9/14	#2	Knowledge deficit related to diagnosis of diabetes mellitus	DCN	9/23/87

DISMISSAL PLANNING

Discharged to: Home/self RETURNED FRC Transferred to: RETURNED FRC

Mode of transport: Private Vehicle

Discharge referrals to: Federal Medical Center RETURNED TO FMC

Post discharge living arrangements (continuation, significant other): RETURNED TO FMC

Diet restrictions: regular diet

Activity restrictions: as per rehabilitation

Medications prescribed at discharge: Glucotrol 5mg po qd

Patient/family instructions: Diabetic diet, Glucotrol 5mg po qd, Diabetic Education Program (DEP) Staff to contact patient for DEP instructions. Pt. taught s/s of hypoglycemia, hyperglycemia, diet, exercise, and importance of compliance with medications. Pt. discharged to further teaching unit for DEP.

E. M. Signature: Donna Pellmann Discharge Date: 9/24/87

[redacted]

3 986 744 ... 4 ...
BELLECOURT, MR CLYCE
050036 ROCHESTER, MN 55903
RR DOA 10004 897687 11044
FED REG CENTER

[redacted]

NURSES' ADMISSION ASSESSMENT

... used chewed chest pain x radiation to left, had not taken since 12 Noon ...

... hydration d/chest pain - MT

... what ... normal sinus rhythm ... 1st and 2nd peripheral IVs infusing.

... within 2-3 weeks/long

... good appetite

... general diet ... losing to lose weight

... normal amt of ...

... Bowel sounds active LLQ ... 8-10 ... QS BID 24/n

... regular stools 60 ... stools,

... additional on admission to 10th

... Patient is ... MSO4 and NTG gtt IV

... Patient ID

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Monday Oct. 30, 1989

K: Present are Daryl Kosiak, Dr. Alan Wynne and Dr. Michael Trujillo. Discussion of Mr. Clyde Bellecourt who alleges that on Sept. 16, 1987 he suffered a heart attack and about the treatment that carried on thereafter. The purpose of this conversation is to send it on to Mr. Lonnie Bryant, an Assistant United States Attorney, to give him a better feeling of what happened. So, do you have any questions about why we're doing this as we are?

W: No, I do not.

K: And the reason that Dr. Trujillo is present is incase there is any medical questions that should be asked that my expertise doesn't allow me to even be aware of. So we are going to proceed that way. Okay. Dr. Wynne, could you spell your first and last names for me please.

W: Sure, A L A N W Y N N E.

K: And what's your age?

W: 30.

K: And your current address.

W: 2841 C 19th Ave NW, Rochester, Minnesota 55901.

K: And could you tell me something about your education.

W: My education, as far as medical school was at the University of Missouri in Columbia, Missouri. And Internal Medicine Residency training was three years here at the Mayo Clinic in Rochester and I am now in my second year of an Endocrinology Fellowship at the Mayo Clinic as well.

K: Could you tell me when you graduated from med school?

W: Medical school graduation was in May of 1985.

K: And when did you complete your Internal Medicine residency?

W: Internal Medicine was completed in June, late June of 1988.

K: I assume then that you hold a Medical Doctor degree, or a degree in Medicine.

W: Yes, that is correct.

K: Do you hold any other degrees? I mean any other than under graduate one?

W: No other degrees but a year ago I did pass my Internal Medicine Boards.

K: Alright, you can tell me something about the Internal Medicine, the procedure for becoming board certified in that.

W: I sure can. It requires that we complete 36 months of an accredited Internal Medicine program, which I did, and I think what you're leading up to is where was I at the time that I met with or took care of Mr. Bellecourt and I was just reviewing that recently and I think that

it is pertinent that in the twelve months of my residency prior to taking care of him, that of note, two of my rotations were my emergency room rotation at the Clinic, which was two months worth and then I think very importantly I had just finished six months of in-house cardiology training. We are required to do six months of our three years of cardiology and I had just finished that before taking care of him.

K: Now for my own benefit Dr. Wynne, tell me exactly what an Internist does. Somebody who is board certified in Internal Medicine, how do they stand in relation to a general practitioner or family practitioner and then the cardiologist.

W: Well, an internist takes care of basically any medical problem that is non-surgical, non-obstetrical and non-

pediatric. So that leaves basically any other disorder or disease effecting the internal organs from heart to lungs to kidneys to gastrointestinal problems, cancer, etc. So pertaining to Mr. Bellecourt's problems, internists do regularly take care of heart attack patients, patients with chest pain and diverse variety of cardiology problems. But when there are particularly difficult or demanding cases, then that is where it might be appropriate to consult with a cardiologist who has subspecialty training, usually two to three or four years in just cardiology.

K: You are currently licensed to practice medicine in the state of Minnesota.

W: Yes.

K: Are you licensed anywhere else?

W: No.

K: This is just one for the record, has your license to practice medicine ever been suspended or revoked?

W: No.

K: You're currently board certified in Internal Medicine but you weren't in September of 1987.

W: Right.

K: Do you belong to any medical societies?

W: Yes, I belong to the County Medical Society here, Zumbro Valley Medical Society; the state medical society, the Minnesota Medical Association and the American Medical Association and also I am a diplomat in, or a member of the American College of Physicians as well.

K: Now have you ever been in court, either as a party or as a witness?

W: Yes I have. I witness a car accident and I was asked to testify about that, about seven years ago.

K: But you've never been involved in a court either as a party or as a witness concerning your ability to practice medicine or somebody elses ability to practice medicine.

W: No.

K: Okay, very good. At this time do you have any professional liability insurance?

W: Yes I do. I do through the Clinic in that I am still a fellow there and they cover my practice there and then I work at a number emergency rooms in the state and actually had been for about a year before even encountering Mr. Bellecourt and as such, I am covered by different liability policies for practice in just those emergency rooms at those places.

K: But you don't have any professional liability insurance where you yourself pay the premiums.

W: Correct.

K: Now, I want to talk to you about your relationship with the Federal Medical Center. Now, when did you first start coming out here, to the Federal Medical Center?

W: Oh, I believe that was in the Spring of that year which was 1987, so I believe maybe around April of '87 was my first shift.

K: When you talk about a shift, what time did you come out and then what time did you go back.

W: The usual shift is an evening shift starting at 6:30 in the evening and going, I guess it's 6:00 in the, no it's 6:30 in the evening going until 6:30 in the morning and that's every night there is a

shift available and then on weekends there are 12-hour day shifts from 6:30 a.m. to 6:30 p.m..

K: Is it your understanding that what the arrangement is between you and the Federal Medical Center and has nothing to do with the Mayo Clinic.

W: Yes, that's correct.

K: And it, are you limited into the number or as to the number of shifts that you can work in a specific period?

W: Oh, um, I guess I'm not sure of the answer to that. I know that it's fairly flexible, I've worked from none at all if I don't want to or can't find time for the shifts up to as many as five shifts per month. I think I could even work more, I'm not sure.

K: Can you tell me about how you are paid then for your services.

W: I am just paid as a contract employee, an hourly wage and the next month I just get a check in the mail that's for the number of shifts I've worked.

K: And that is made payable to you then, it comes directly from the Department of Justice or the Federal Medical Center.

W: Right.

K: Now, when you come out here, do you know in advance what you're going to be doing that shift.

W: No, I have no idea.

K: Then when you come out here, how do you find out what you're supposed to do, if anything.

W: When I come out here, I always check a board, there is an information board or clipboard, that's up at the nurses station that usually is the very first thing I check because it outlines how much work

there is to do any particular evening which can range from little or nothing at all to several inmates waiting to be examined. So, I just have to check that at the beginning of every shift.

K: When you talk about doing examinations, is that the intake physicals that are usually done on the inmates when they come in?

W: Yes, that is correct. On the new inmates but that can either be the general population or new inpatients that are actually sick on the hospital ward.

K: Now, are, do you bring in any equipment of your own or from the Mayo Clinic? Or is the equipment that you are going to use, who is that provided by?

W: It is all provided by the Federal Medical Center here.

K: And as to how you actually do the physicals or do your other duties, are you

provided with any guidelines by the Federal Medical Center?

W: Oh, um, I don't think in any real specific terms, I mean they expect a very complete history and physical examination, pretty much as I had been trained to do in my training and I guess there are guidelines in a sense that in the physical form it lists the components of the history and physical that they want but they are pretty standard. So, I don't think that there is anything real specific to the Federal Medical Center.

K: As part of your duties, are you, does this include providing emergency medical care as needed by the inmates here?

W: Yes it does in that that's something that can just happen at any time, I mean when we come in the evening we have a set number of physicals to do and once those are done, most often that is the end of

our work for that shift, whether we finish at 10 or 11 or midnight. Then we can sleep the rest of the shift. But we are always available by telephone contact in our room for any emergencies that arise and that does happen periodically.

K: Now, can you tell me something about what decisions that you can actually make on your own as a contract physician who comes out here. And that would include such things as termination to provide specific tasks, decision to transport an inmate from here down to a community hospital or things like that. And which things that normally a physician would do require some type of approval from staff physicians.

W: Sure. Oh, any kind of care that we are asked to give, diagnosis or treatment that is fairly straight forward or easily done, just myself, without outside

resources or permission say to transfer somebody out of the institution, then I can do that all on my own. But there is always ready back up from our medical officers, who ever is on call and if I have any questions about such as transferring somebody out for more definitive care, if it's not something that we are not able to provide that falls under the guidelines for contacting the medical duty officer on call or if it's a particularly difficult case, because of oh orders that are already given, such as not giving the patient narcotics, but they are really insisting on that, then we are free to call the medical duty officer. So, anything that is more than what we feel comfortable dealing with, then we call our backup.

K: Now, I want to take you back to Sept. 15, 1987. And that is when you started a

tour out here at the Federal Medical Center. I know this is going back a long way but I want you to tell me as much as you can about what you did on Sept. 15th starting from the moment you got up until the time you left the Federal Medical Center on Sept. 16, 1987.

W: Starting with when I got the call?

K: I want to start from the very day one, when you went to work at the Mayo Clinic on the day of the 15th, if that's what you did.

W: Oh.

K: As much as you can recall.

W; Ok. Well, um, I won't remember much about that day itself. I guess at that time I was on the Rheumatology Service at St. Marys Hospital so, more than likely, it was a light day. That is generally one of our slower services. So, I don't remember the specifics of that day but I

obviously got off in time to come out here to start my shift that evening and I do remember what building we were stationed in, we were over in Building 10 at that time. There were a lot of different rooms where they put the on call contract physicians but that's where we were and I think it was an uneventful evening as well as the general physicals were concerned. I don't remember if had one or two or three but nothing uneventful really sticks out in my mind. And then I remember the room where they had us stay and sleep there and just a usual night, went to bed at, not sure, maybe eleven or midnight, and then I remember much more clearly what happened after that just because of getting the call about Mr. Bellecourt. I remember it well because, as I say, it's unusual for us to get a call in the middle of the night to go out and see somebody,

especially a house call over in their quarters. So, so I remember that well. I just remember the phone going, ringing and waking up and taking a couple of moments to really figure out what was going on and realizing that I was being asked to go see a patient in another building. So I put on my scrub uniform and my jacket also because it was getting cool by then and it was raining outside. So I remember it was cold and wet and went with the security officers over to Building 2 and I don't think I had ever been in there before. So, I needed them to show me around an where to go. Got in to an inmates room and I guess on the way they told me that there was an inmate having chest pain and that they needed me to evaluate. I said sure and asked them, as I recall, to pull any records that were available on this gentlemen and I think I also maybe asked

the nurses if if they knew of this gentlemen, if he had ever had any chest problems or chest pain or heart problems before and I don't remember what the answer was, they either said no they didn't think so or they'd have to pull the records. So I got over there and walked in to a small room with four bunk beds, two sets on each other and he was to the right side of the room, the patient was, in the lower bunk. And he was sitting up calm, just looking concerned but not in any acute distress of any sort. And then when I went in there I was flanked by probably two or three security officers and then as I recall one or two of his roommates, if not three of them, were in there, all in their bunks, just kind of awake looking at what was going on, so there were a number of people around. And, I just introduced myself as Dr. Wynne

that was there to see what was going on with his symptoms and I learned his name actually on the way over as Mr. Bellecourt, and asked Mr. Bellecourt what he was experiencing and he mentioned that he was having some chest pain and that it was in the center of his chest and so obviously concerned that this might be a heart problem, that he was having some cardiac ischemia, I asked the.....

K: What's cardiac ischemia?

W: That is a lack of blood flow to the heart muscle itself which probably the most common symptom, if somebody is going to have symptoms with that is, chest discomfort or chest pain. And obviously in the setting of chest pain of any sort, that is the most serious possibility that needs to be checked into and explored and ruled out. So having established that he was having some chest pain, I asked him

the usual questions to further clarify the nature of the chest pain. And there is a series of questions that need to be asked to see if the chest pain that the patient is having fits the usual description of heart pain, chest pain that's due to not enough blood getting to the heart.

K: Just, I hate to interrupt you, but can you go through the litany of these questions.

W: I sure will.

K: And then if you recall, what Mr. Bellecourt's responses were.

W: Yes, I remember the questions and I know that most of those questions answers are in my note that I wrote about him and I think that the answer to those questions are very important because I remember very clearly asking them to Mr. Bellecourt and just being more and more convinced that this really did not have much character or

quality at all of cardiac ischemia, not enough blood getting to his heart. I asked him had he ever had chest pain like this before. And he said that he had on several occasions in the past, um, but I asked him what typically brought on the chest pain, and a chest pain that typically is due to a heart problem, not enough blood getting to the heart, is brought on or made worse by exertion. Something that the body is doing to require more output by the heart. And he said that never got this chest pain in the past when he exerted himself. In fact, I asked him about what he did in the way of exercise or exertion and he related that he regularly walked two to three miles per day at a rather fast pace and that he did that even that day that I had examined him, earlier on the 14th or 15th and that he had not had any of this type of chest

pain with that exertion and that he never did with exertion. But that the chest pain typically occurred after lying down, within twenty minutes of lying down to go to sleep. And one type of chest pain that can act that way, isn't heart pain but rather a problem with stomach contents, acid in the stomach coming up into the esophagus, what we can gastroesophageal reflux, which typically is worse if somebody has eaten a snack or meal later at night and then lies down and then it can be relieved after sitting up. And he related that often times his pain like that in the past, he would sit up and that would help. So, as far as other questions, I asked him if it hurt worse for him to breathe in deeply. And as I have documented in my note, that definitely it did. It hurt worse to breathe in deeply. And that type of chest

pain that we described as pleuritic, meaning just that, that it is worse, the pain is, if somebody takes a deep breath in and that typically is not characteristic of cardiac pain either. That suggest more something with the lining of the lungs or some problems with their rib cage that it would hurt worse if somebody is taking a deep breath in or out. Other questions I asked him was, did he have any radiation of the pain, or movement, spreading of the pain into another part of his body and he said he did into his right arm. And certainly heart pain can move into the right arm, although less commonly than it does say into the left arm or to the neck. I asked him also if he had any associated nausea, vomiting, or sweating, which is typical sometimes of heart pain and he said no. I asked him if he had any shortness of

breath with the chest pain and he said that he did. But that can go along with heart pain or lung pain or chest wall pain, any of the number of chest pain. I asked him if he had ever had any heart problems before, ever been diagnosed with a heart attack or angina, which is chest pain due to heart pain and he said no that he never had any known cardiac or heart diagnoses. I asked him if he had ever tried anything medically for his chest pain such as antacids, thinking that it might be, as I say some acid coming back from his stomach into his esophagus, he said no he had never tried that nor had he tried any nitroglycerin or other heart medicines. So we didn't have that history to help out. Asking him about his risk factors for heart disease, there is a set list of five or six risk factors that we ask about in patients that we are

concerned that might have a blockage of their arteries going to the heart causing chest pain, heart symptoms. And I went through that list with him and specifically he had no known history. High blood pressure, of diabetes, of family history, early heart disease, he was a smoker however, so that was one risk factor for coronary artery disease as well. So, I guess those are the bulk of the questions that I asked Mr. Bellecourt trying to get the character and the flavor of his pain and I guess at this point just hearing the story that it certainly was not classic for cardiac ischemia, that it was not heart pain, as my first diagnosis but as any internist knows, cardiac ischemia, heart symptoms, can present in a whole lot of different ways. As belly pain or just simply right or left arm pain and no chest symptoms at all. The

threshold or index of suspicion has to be low for looking at any symptom that might be heart pain as possibly being just that. So, with that in mind I wanted to do some more testing on him and I asked for some antacids and some nitroglycerin to try some therapeutic intervention to see if this chest pain either to the appropriate therapy for heart pain or gastroesophageal reflux, the acid pain in his esophagus. And as I say I was over in the GP complex in Building 2 and neither of those medicines were available so I think one of the security officers radioed to the nurses over in Building 10 to bring some over and they either brought it over or one of them went over to get the antacid and the nitroglycerin. And in the meanwhile I did examine Mr. Bellecourt and noted a normal exam. Lung exam was normal. Heart exam was normal. No signs

of any heart failure, meaning the heart not putting out enough blood and fluids backing up into the lungs. And also importantly there was no sign of any chest wall inflammation. He had a history of chest pain being worse by breathing in and out which as I say raised the possibility of some chest wall inflammation, the ribs or the cartilages around the chest wall. And often times if that is the cause of chest pain, you can reproduce the chest pain by pushing in on the chest wall and the patient will say yes that's exactly it the kind of pain where they can direct you to where they are hurting. And I did that with Mr. Bellecourt and there were no particularly tender areas. So, that was helpful as well. I had less suspicion that he had a costral chondritis, an inflammation of the chest or ribs there. And then later what happened was within a

few minutes I had the antacid available and that was the first thing I tried. I gave him 60 milliliters, 60 cc of Maalox, I think I gave him 30 cc a time and asked him to drink that, he was sitting up, just waiting to see what the results were. And I should mention that early on in examining him I explained to him our 10-point pain scale which we often times ask patients to categorize their pain that they are having on a scale of 1 - 10. 0 being no pain and 10 being the worst pain they could imagine. We will ask them early on to grade their pain somewhere on that scale to get an idea if this patient is really having a lot of pain and they are just being stoic or if if in fact they're not experiencing much pain, etc. So I asked him early on to grade his pain and I don't remember the exact number but I remember it was not very high. I think

he told me it was about 3 or 4 on a 10-point scale. And I asked him what was it at it's worst. I mean the pain had just started. Oh, I think less than 10 minutes before I got there because they called me right away and he said it was in that same range as I recall, it wasn't over 5. So, in my mind I knew that it wasn't an excrutiating or severe pain that he had been having but probably more mild to moderate. And we waited for the initial dose of antacids to help and as I recall about 3 to 5 minutes later asking him what he thought about the chest, he said that it had definitely helped and he said that the pain was down to about a 2 on the scale and that it had been relieved by about 50%. So that's when I gave him the other dose of antacids and once again we waited another 3 to 5 minutes and at the end of that time he said that the pain was

almost all gone. And I remember that I did not leave until I was sure that he was not having pain and that's just an important principle that I abide by and have learned just doing emergency room work and cardiology work as well is in a situation like this, if we are going to hold off any further cardiac evaluation, it is important that the patient is pain free because if the patient is still having any pain at all and if it is heart pain, then there is a risk that that patient is having ongoing ischemia or lack of blood flow to the heart and potential heart damage from that. So, we waited another few minutes after the last dose of the antacid and I asked Mr. Bellecourt, now are you having any chest pain at all and he said no. And I told him that that was very important that he was not having chest pain now but it was also very

important that he let me know or the officers know if he had any further recurrence of his chest pain, because you know this, this is the type of scenario that physicians encounter all the time, in the emergency room or on a hospital ward and it's just important that the patient is quick to let us know if there is any recurrence of chest pain so we can do further investigations and decide what is going on. I need to mention also that the question has come up and I know will be coming up about the appropriateness of obtaining or not obtaining an electrocardiogram at this point. And, in general, with this kind of patient, if I had encountered Mr. Bellecourt or anybody else in this setting versus and emergency room where I had an electrocardiogram 12-lead right at my side and some nurses ready to obtain that, I think that yes I

would have probably obtained an electrocardiogram even though, once again with his exact same history, I would have had a relatively low threshold of suspicion for cardiac ischemia. But once again it is important to look at the availability of medical resources. And in an emergency room, here in town or elsewhere where I work, that's just so readily available and I would do that as further documentation that there is or is not cardiac ischemia going on. But in this setting we did not have an electrocardiogram available in the building and there was an old electrocardiogram available in the building and there was an old electrocardiogram, an old model available over in Building 10, the type that requires 12 different separate leads to be run one at a time and it is cumbersome but

we could have done it and I remember very clearly thinking through my options. I thought well our choices would be two fold, if we need to get an electrocardiogram on Mr. Bellecourt, that is if he has a recurrence of chest pain, I'd have two options, #1 would be to get that electrocardiogram over here in the rain, now I sometime later, some days or weeks later, learned that there is a subway system in the complex here, but I was not aware of it at that time because I remember thinking through my only two options to get an electrocardiogram on him would be to get the nurses to wheel that over in the rain, across the sidewalks and into Building 2 and yes that could have been done if he had had more pain or we really needed to or #2 would be to transport him over to Building 10 to get an electrocardiogram and maybe to admit

him there for the night to observe. But the options there would have been cumbersome as well. I don't know how that would be done logistically, I'm not sure wouldn't feel comfortable walking him over there if this. Option #2 would have been to walk him over to Building 10 but that would have been risking if we were really once again concerned about not enough blood getting to the heart because that would have not been the proper thing to do either. So I guess to get him over our options would have been a wheelchair or a stretcher. But I don't know how readily that could have been done either in terms of stairways or steps going up to building 2. I mean we could have explored that further and I was willing to do so if clinically there was an indication that we needed to be more aggressive or more to pursue the possibility of heart problems

further. But once again I just think it is important to look clinically at what is going on with the patient. He was instructed after he was pain free with the antacids to let us know if he had any further chest pain at all. And I told him I was there until 6:30 in the morning and beyond 6:30 there were other physicians there, there was always one of us available and that it would be very easy for me to wake back up and come back over and to pursue this further. And I told him that we would obtain an electrocardiogram if he had any recurrence of his chest pain and as you'll see in my note, that I documented that very clearly, that he was instructed to let us know if he had anymore symptoms and that we would obtain an electrocardiogram at that time. I think his total duration of chest pain was probably 25 to 30 minutes because I

think I was actually over there before even 20 minutes. They called me rather early on and after I got there, you know I talked him with him for probably 5 minutes or so before we started giving him antacids. And he was pain free at the time I left.

K: Do you have any idea about how long you spent with Mr. Bellecourt?

W: Oh, I would say that I spent probably 30 minutes with him.

K: Do you recall if Mr. Bellecourt ever asked you to run an EKG on him?

W: No he did not. I mean I recall ya, he did not ask that.

K: And I imagine that after that you received no other phone calls that night.

W: No.

K: About Mr. Bellecourt or about any other of the patients in reference here.

W: No I remember going back once again in the rain and being at the nurses station and writing a note on him and wanting to be detailed in recording what had happened during my encounter with him because I had spent a while with him and I asked the nurses about him once again if they knew of any cardiac history and reviewed his history and there was no evidence of any cardiac history and just asked them to let me know if there was any further signs of any problems with Mr. Bellecourt and then I went back to sleep at what ever time that was, 2:00 or something and did not hear anymore that shift. And when I woke up in the morning I don't know if I asked them or not how he was doing because sometimes the nurses aren't readily available but I think that if I ran into one of them I did but they had not heard anything either.

K: If you had believed for what ever reasons that this, well one more question first before we do that. Do you have, when you went over there on Sept. 16, 1987 and either the correctional officer or somebody else told you that this was Clyde Bellecourt, did you have any idea who Clyde Bellecourt was?

W: No, I did not. And if you'll notice in my note, I do start off saying that I was asked to see a 51-year-old Indian male and obviously at the time I was writing the note, I had been told that Mr. Bellecourt was a Native American Indian. And I tried recalling when I found out about that and it's one of two times. Either on the way over there the correctional officers told me that this is Mr. Bellecourt, that he was a prominent American Indian and they asked me if I knew him and I said no. So I think maybe

I was told on the way over there or I was told on the way back from Building 2 that he was a prominent American Indian because obviously I knew that when I wrote the note. But I remember them specifically asking me either on the way over or back, don't you know of him. And I said no I said I don't in fact there's a lot of people that are inmates here that are supposedly famous for one reason or another and they tell me their names and I usually have never heard of them at all and Mr. Bellecourt is an example. I am not from Minnesota or anywhere up in this area where he has lived or I guess made news and I had never heard of him before.

K: My question before that was, and I started to ask you was that if you had had stronger clinical indications that Mr. Bellecourt's pain was somehow related to a cardiac problem, what would you have done?

I mean what could have been the normal course of treatment for a physician in the community having say if Mr. Bellecourt would have presented these problems, I don't want to use the emergency room because that puts us back into the EKG, but say it he would have come to a clinical examination at the Mayo Clinic, comes in and sets up an appointment with an internist there, that's what he has done and here's this man now in your office and what should have been and what would you have done under the same circumstances.

W: In an outpatient setting, and this happened to me just recently when I was seeing a patient in the outpatient setting, I would have done something very similar to this. I mean get the same thorough history and the nature of the chest pain and um depending upon my

clinical suspicion, as with Mr. Bellecourt, if I don't suspect that it is cardiac in origin and the patient is now pain free, then then further evaluation or investigation of that chest pain is something that can be done more leisurely with explicit instructions that if the patient has any further chest pain to be sure and be seen right away for evaluation because that's helpful to get an EKG during chest pain. But if I encountered him in an outpatient setting, what would I have done. I would do the same thing, especially as I say if I don't have an electrocardiogram readily available.

K: What would an electrocardiogram have told you, if anything. If you would have run it if he was in a pain free setting would it have told you anything more? Possibly or

W: Well, if he was pain free, then there is less likelihood that it would have been helpful. If he had already started to infarct, which we later find out that he did have heart problems, if he had already started to have damage to his heart then we could have seen some signs on the electrocardiogram. But aside from that, in general, if somebody is having heart pain and it is true heart pain and you do an electrocardiogram when they are pain free, then the chances are less if if they are pain free that it is going to show any abnormality than if they are having pain at the time. We can see signs of not enough blood flow getting to the heart much more often when they are having pain than when they are not having pain.

K: Is that what, what does exactly an EKG tell you. I mean what is the

underlying principle behind it and how would it have worked or.

W: Well, specifically in this setting, somebody with chest pain, we are looking for um, one of two main things. We are looking for signs of not enough blood getting to the heart or #2 that there has actually been heart damage, some death of some heart muscle, from not enough blood getting to the heart for a prolonged period of time. And what we see on a certain part of the electrocardiogram tracing, what we call the ST segment, is very often if the patient's having chest pain and there is ongoing shortage of blood and oxygen getting to the heart, we'll see a depression or lowering of that component of the electrocardiogram tracing. If the patient actually has had chest pain going on long enough to where they have and severe enough to where they

have heart damage from the lack of oxygen, then we'll see often times a different abnormality on the electrocardiogram, we'll see and elevation of the ST segment or what we call the J point. So we're looking for one of two things, either signs of a real heart attack, heart damage or just that the heart is showing some signs of strain from not getting enough oxygen.

K: Dr. Trujillo do you have any questions?

T: No, I think he covered everything pretty well. Just a couple little minor things and I haven't read the chart at all yet and I was wondering whether you took any vital signs when you first came in and how that was, whether he had a regular rhythm or how his pulse felt, what his blood pressure was like.

W: OK, I did check his pulse. And yes his pulse was normal as I documented here. As far as regular rate and rhythm, I don't, I don't believe I got a blood pressure because I did not have a blood pressure cuff available or with me. But he was not complaining of any lightheadedness at the time.

T: Did he, when you were talking to him about the pain he was asking for the _____, did he point in any way to where the pain might have been or any gestures or anything like that in regards to what he _____ with hand movements or anything?

W: Pretty much in the center of his chest, not to the right or the left. Pretty much the center.

T: Did he point or did he go by this or did he go like this or anything like that.

W: I understand what you're asking and I don't recall if he gave us a classic fist sign, I don't think so, I think he just said more in the center of his chest.

T: Okay. _____ Did he look in any way particularly distressed or ashen or even though he was having anxious anxiety or anything like that in any way what so ever, or when you felt his hand when taking his pulse were they clammy or cold or anything like that.

W: I think that is a real good question and the answer is no, he in no way looked distressed at all, I think if anything when I walked in he was looking quite calm and collected but just concerned and sitting up. But after I spent a while with him and I as I say it was about a half hour or so and I talked to him and examined him and given the antacids, if anything, I just got the feeling that he

was awkward or embarrassed that here there were all these security officers and his roommates looking at him for this period of time. But no, at no point during my encounter with him was he in any way in distress either in obvious pain or short of breath or sweating or ashen nothing that suggested that there was any problems with his vital signs or that he was hiding anything that was going on.

T: In your examination, the heart sounds were fine and there was no _____ hear gallups or anything like that.

W: No suggest of a rhythm problem. Regular rate and rhythm, no murmurs, no gallops. And I did a good lung exam and there was no pleural _____ nothing to suggest a pulmonary embolus as I mentioned the chest wall exam, really the whole examination was normal.

T: Abdominal exam revealed nothing, no pressure, nothing like that.

W: Right.

T: _____

_____

W: Right.

T: I guess in your opinion could have ischemic changes or damage occurred in the so-called silent heart attack _____ _____ or at that time or _____.

W: Ask your question again.

T: This would have, could the symptomatology or anything like that be call a silent heart attack. _____ _____ terminology _____. He had had a silent heart attack, of course this still could have been _____ for something else. At that time or later on, before or anything like that.

W: Well, I think you raise a good question, if I understand your question correctly. Were the symptoms in fact cardiac ischemia, obviously, you know a month later or now two years later we have the benefit of knowing that he did sustain a myocardial infarction were these chest pain symptoms that he was having at 1:00 in the morning for sure cardiac ischemia. I mean looking at all the data in retrospect, probably so but there is no way to document that either. Um, could this have been GE reflux, gastroesophageal reflux as he had been having for months, once again it could have been because they were absolutely nonexertional in character and he had never had any chest pain like this when he would walk his two or three miles, could this have been a separate kind of a chest pain and then during that night or when ever that morning, he had

either silent ischemia or infarction or as I understand he did have some more symptoms later on in the morning, but once again I've not even seen those medical records to know what those symptoms were if they were like these symptoms.

K: I just have a couple of questions for you about your note, because this is going to be very, very important, your note is I'm sure you're probably aware and you have a copy of that and this is more for my own information, the little + sign in line 4 inside the circle, what does that mean. It says right upper extremity, I assume, and then at the very end there is a + sign in a circle.

W: And that goes with the next line Positive or presence of associated shortness of breath.

K: Then continuing on line five but not is that n,v and diaphoresis.

W: Right, no nausea, vomiting or diaphoresis.

K: And what's diaphoresis.

W: Sweating.

K: Sweating, okay. And down 1,2,3,4,5,6,7 12th line Antg antacid and nitroglycerin. And the third line underneath that, so approximately the 15th line, it says no known, is that history of, angina.

W: History of angina, myocardial infarction, hypertension or diabetes mellitus.

K: But there is the problem with smoking.

W: Ah ha.

K: And then two lines below that, no chest wall tenderness there appears to be a ; and then I can't make

W: That's COR which is our abbreviation for cardiac examination and then there is

a - regular rate and rhythm and then without murmur which is the M circled and - S-3 which is heart gallop.

K: Alright. Do you have anything else you want to tell us.

W: Um, I don't think so about my recollection.

K: Anything else.

T: Nothing really other than I'd like to complement you on the writing, we could read it.

K: What we'll do with this Alan is that I'll have this transcribed, send you a copy of it and just for your own information what's going to happen now, we're waiting to get word yet about your representation, ya or nay and I can

T: _____

K: I can assure you

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil No. 4-89-828

Clyde H. Bellecourt, Plaintiff,	)	
v.	)	**AFFIDAVIT OF CLYDE H. BELLECOURT**
United States of America, et al., Defendants.	)	

STATE OF MINNESOTA	)
	)ss.
COUNTY OF HENNEPIN	)

CLYDE H. BELLECOURT, being first duly sworn on oath, states and alleges as follows:

1. That your Affiant is the Plaintiff in this action, which your Affiant initiated seeking compensation for injuries your Affiant experienced due to the actions and inactions of Defendants,

such conduct by the Defendants is described with particularity within your Affiant's complaint herein, and within your Affiant's Request for Administrative Remedy dated and submitted November 29, 1988. (Exhibit A, attached)

2. Your Affiant has reread the content of his Complaint in the instant matter and has reread your Affiant's Request for Administrative Remedy and reaffirms that the allegations and information set forth within these documents are, to the best of your Affiant's knowledge, true and correct.

3. That your Affiant worked with attorney Larry Leventhal and attorney Margaret Penn in completing a Request for Administrative Remedy to be submitted to the Federal Medical Center, Rochester. Your Affiant initially wrote out material which formed the basis of said Request for

Administrative Remedy, and thereafter met with Mr. Leventhal and Ms. Penn to have the administrative claim prepared in final form.

4. Your Affiant recalls receiving in November, 1988 a draft of a Request for Administrative Remedy prepared for submittal. This document consisted of a narrative, a form supplied by the institution, and accompanying correspondence to be signed by your Affiant. Your Affiant was asked by Mr. Leventhal to bring this material home and read it and further advise should any alterations or additions be desired.

5. On or about November 29, 1988, your Affiant was in Mr. Leventhal's office to confer concerning another matter, when Mr. Leventhal inquired whether your Affiant had read the Administrative Claim draft your Affiant

had been furnished. Your Affiant replied that he looked at it but had not studied it in great detail. Mr. Leventhal stated he wished to assure its prompt submittal and asked if we might sit down and review it at that time. We did so, and your Affiant suggested certain corrections and changes. These corrections and changes were handprinted on the typewritten draft by Mr. Leventhal. This draft is attached to the Affidavit of Larry Leventhal.

6. That your Affiant signed the submittal after the narrative was finalized by Margaret Penn using a computer while your Affiant waited. Your Affiant signed the accompanying letter that had previously been prepared for submittal to Associate Warden Olson of the Federal Medical Center, Rochester. The date on said letter was changed by Margaret Penn in order to indicate the

date of anticipated mailing which was November 29, 1988, the same day as our meeting. Your Affiant was advised that these documents would be mailed on that date and your Affiant would receive a copy thereof.

7. That within several days following the aforementioned meeting, your Affiant received a copy by mail of the document your Affiant had signed at the law offices of Larry Leventhal and Margaret Penn. Your Affiant was advised that the document had been sent as addressed to the Federal Medical Center, Rochester.

8. Your Affiant has been provided a copy and has examined the text of an interview between Defendant Dr. Alan Wynne and Assistant United States Attorney Lonnie F. Bryan dated October 30, 1989. Further your Affiant has examined an

account by Dr. Wynne contained within your Affiant's medical records which purports to set forth an account of the complaints of your Affiant, conversations between your Affiant and Dr. Wynne, and Dr. Wynne's response on September 16, 1987. Portions of the statement and the report are, to your Affiant's belief, false and misleading, particularly statements attributed to your Affiant minimizing your Affiant's distress at the time of the conference between your Affiant and Dr. Wynne. Your Affiant did believe, and expressed the belief to Dr. Wynne that he was in the midst of a heart attack, that such matter was of very serious medical consequences. Further your Affiant specifically requested the utilization of an electrocardiogram in order that your Affiant might be appropriately tested.

9. Lieutenant Cliff Friese was present during the conversations between your Affiant and Dr. Wynne. As your Affiant repeated your Affiant's insistence that his condition was serious, Lieutenant Friese warned your Affiant that he should be quiet and not make trouble, or else your Affiant would risk being sent to the "hole". The "hole" is a term for solitary confinement, and your Affiant feared that should your Affiant be insistent upon the need for medical care at any time during the night, he would indeed be sent to the hole. Your Affiant believed that chances of receiving later medical care were slight should your Affiant be placed in the "hole" and that your Affiant would face a probability of death.

10. After your Affiant was diagnosed to be having a heart attack, approximately 9 hours after your Affiant's

initial report, your Affiant remained in the control and custody of the Federal Medical Center, Rochester, and was placed into and treated at St. Mary's Hospital. Your Affiant remained under guard during the period of his hospitalization. Your Affiant's hospitalization was entirely under the direction of the Federal Medical Center, Rochester, and the hospital it engaged. Your Affiant did not receive any private medical attention until after your Affiant was released from incarceration in May, 1988.

11. All records of your Affiant's medical treatment and other matters attendant to your Affiant's medical problems, would, to your Affiant's knowledge, be under the control and direction of the Federal Medical Center, Rochester and/or St. Mary's Hospital.

12. While your Affiant was hospitalized, and during the period following your Affiant's release from the hospital back into the general population at the Federal Medical Center, Rochester, your Affiant spoke with a number of individuals concerning the circumstances of your Affiant's complaints of his heart attack not being initially attended to in a reasonable manner. Your Affiant participated in such discussions with Hospital Administrator Dr. P. Benantz, Associate Warden Helman, your Affiant's counselor, Keith Farrell, and your Affiant's case manager Paul Schultz. It was your Affiant's impression that each of these gentlemen were fully aware of the nature and extent of your Affiant's claims of having been mistreated within the Federal Bureau of Prisons.

13. That prior to your Affiant being placed at the Federal Medical Center, Rochester, your Affiant spent approximately eleven (11) months at the Federal prison at Springfield where most of the inmates your Affiant encountered were, unlike your Affiant, designated as being of high security. Your Affiant was placed at said location despite the recommendation of the sentencing judge that your Affiant be placed as near as possible to his home in Minneapolis, Minnesota. Following approximately eleven (11) months at Springfield, your Affiant, was driven to a number of Federal institutions; including Terre Haute,, Indiana; El Reno, Oklahoma; Levenworth, Kansas; and an institution in Michigan over the course of several weeks before being delivered to Rochester. Your Affiant is of the belief that such

treatment, within the Federal Bureau of Prisons, occurred because of your Affiant's identity as an activist in a number of American Indian causes. Your Affiant is aware of correspondence received by his attorney Douglas Hall, responding to an inquiry concerning your Affiant's treatment, where an official of the United States Marshall Service indicated that your Affiant was considered to need special security arrangements because your Affiant was under investigation for potential crimes at Wounded Knee in 1973. This, however, was long after all charges brought against your Affiant associated with Wounded Knew had been dismissed, and approximately a decade and a half after events occurred at Wounded Knee which led to the earlier dismissed charges.

14. That your Affiant, while an inmate within the Federal Prison system, became aware of repeated assertions by fellow inmates that they had filed respective petitions for administrative remedies, associated with individual claims or losses, and that such submittals were often not responded to. It appeared to your Affiant, that it was common belief, within the institutions in which your Affiant was housed, that such petitions were often not acknowledged or were conveniently designated as being "lost".

FURTHER YOUR AFFIANT SAYETH NOT.

s/

Dated:_____ _____

Clyde H. Bellecourt

Subscribed to and sworn to before me this 20th day of February, 1991.

S/

_____

Notary Public

DISTRICT OF MINNESOTA

THIRD DIVISION

CIVIL ACTION

Clyde H. Bellecourt,

Plaintiff,

vs.

the United States of America,

and

the Federal Bureau of Prisons,

and

J. Michael Quinlan, Director of Federal Prisons, Washington, D.C., in his official capacity,

the Federal Medical Center, Rochester, Minnesota, a division of the Federal Bureau of Prisons,

and

AFFIDAVIT OF MARGARET A. PENN

COURT FILE NO.: Civ 4-89-828

Peter Carlson, Warden
Federal Medical Center,
Rochester Minnesota, in his
official capacity,

and

Dr. Michael Trujillo, Medical
Director, Federal Medical
Center, Rochester, Minnesota
in his official capacity,

and

Cliff Friese, Lieutenant,
Federal Medical Center, Rochester,
Minnesota, in his official and
individual capacities

and

the Mayo Foundation, a Minnesota
Non-Profit Corporation,
Rochester, Minnesota,

and

Dr. Alan Wynne, Resident Physician,
in his official capacities as
resident physician for Mayo
Foundation, and as an employee of the
Federal Medical Center and
individually,

and

Sarah Urriste, Physicians' Assistant, in her official capacities as Physician's Assistant for Mayo Foundation and as an employee of the Federal Medical Center and individually,

Defendants.

STATE OF NORTH DAKOTA)
)
COUNTY OF SIOUX)

Margaret A. Penn, being first duly sworn upon oath, deposes and states as follows:

1. That your Affiant is an attorney duly licensed to practice law in the State of Minnesota, effective October 28, 1988.

2. That you Affiant was employed by Leventhal & Associates, Law Offices, from July of 1987 to September of 1989, first as a law clerk, then as an attorney, and as such was assigned to complete legal tasks and research under the direction of Larry B. Leventhal, attorney at law.

3. That your Affiant states that part of her daily tasks was completion of a daily timelog called "Services Performed Today" and that your Affiant's work for client Clyde H. Bellecourt is accurately stated on those timelogs.

4. That your Affiant was directed by Larry Leventhal on or about August 1, 1988, to complete necessary tasks and

research regarding a possible case for Clyde H. Bellecourt in relations to injuries suffered while incarcerated at the Federal Medical Center in Rochester, Minnesota, a division of the Federal Bureau of Prisons, and that on that date she conducted a review of file materials.

5. That your Affiant, on August 9, 1988, as reflected in the telephone bills for Leventhal and Associates, called the Federal Medical Center, Federal Bureau of Prisons, and spoke with staff eliciting information on the proper procedure for inmates and release inmates to exhaust administrative remedies.

6. That your Affiant, on Friday, August 19, 1988, wrote to Mr. Kosiak, Federal Bureau of Prisons staff, requesting necessary forms to be submitted for claims by prisoners against the Federal Bureau of Prisons under the Federal Tort Claims Act be forwarded to Leventhal Law Offices, and that subsequently, forms - BP-DIR-9 and RCH 1330.7 with accompanying instructions were mailed from that agency and received by your Affiant.

7. That upon reviewing the Administrative Remedy forms and accompanying instructions received from the Bureau of Prisons in response to the written request mailed August 19, 1988, your Affiant, on Monday, September 12, 1998, prepared a legal memorandum to the attention of Larry B. Leventhal and upon his having reviewed the memorandum met with him to review procedures to be followed to assure compliance with and exhaustion of all administrative remedies.

8. That your Affiant, on Wednesday, September 21, 1988, prepared a draft completion of the Administration R dy Forms and accompanying narrative stat nt of Clyde H. Bellecourt for review by Mr. Bellecourt and Larry Leventhal.

9. That your Affiant, on Wednesday, October 5, 1988, reviewed the office file to review the status of the Administrative Remedy forms, and on Monday, October 10, 1988, and again on Friday, October 14, 1998, reviewed the file to check the status of the Administrative Remedy forms and also called the client, Clyde H. Bellecourt, to determine if he had reviewed them.

10. That your Affiant, on October 25, 1988, typed the final version of Administrative Remedy forms -BP-DIR-9 and RCH 1330.7, and proofed the draft of the narrative statement by Clyde H. Bellecourt to be attached to the Administrative Remedy form BP-DIR-9.

11. That your Affiant, on November 9, 1988, meet with Larry B. Leventhal and added corrections to the narrative statement of Clyde H. Bellecourt to be attached to form BP-DIR-9.

12. That your Affiant, on November 29, 1988, was called into Larry B. Leventhal's office where he and Clyde Bellecourt were meeting and that Mr. Leventhal gave your Affiant the cover letter to Associate Warden Olson, the Administrative Remedy forms - BP-DIR-9 and RCH 1330.7 and narrative statement of Clyde Bellecourt to be attached to form BP-DIR-9.

13. That your Affiant, on November 29, 1988, upon being given the above letter, forms, and statement, realized that the cover letter to Associate Warden Olson was dated November 9, 1988, and that your Affiant was unable to locate the letter in the computer files, and that your Affiant accordingly, used "white-out" to change the date on the cover letter from "9, 1988" to "29, 1988" as is reflected in the disparate type style for the numbers on the date of the cover letter.

13. That your Affiant on November 29, 1998, after preparing the letter, forms and statement for mailing, gave them to Lynn Solberg, secretary, in order to have her complete the mailing.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 19th day of February 19, 1988.

/S/
Margaret A. Penn

Subscribed to and sworn to before me
this 19th day of February, 1988.

/S/
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt, Plaintiff, v. United States of America, et al., Defendants.	)	AFFIDAVIT OF LYNN SOLBERG

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

LYNN SOLBERG, being first duly sworn on oath, states and alleges as follows:

1. That your Affiant is a Legal Secretary and has worked in said capacity within the law office of Larry Leventhal & Associates since August 2, 1988. Your Affiant is currently employed in this position with Mr. Leventhal.

2. That as legal secretary in a small office your Affiant's duties are varied and include typing of documents, photocopying, answering telephones, receiving mail, responsibility for mailing outgoing mail, and certain aspects of office management.

3. In November of 1988 there were three (3) attorneys working within the office of Larry Leventhal & Associates, these were Larry B. Leventhal, Margaret Penn, and Janice Frankman. Your Affiant was the sole secretary in the office and was responsible with all aspects of secretarial duties for Larry Leventhal and Janice Frankman, part-time help was available and had responsibility for bookkeeping and billing activities. Margaret Penn was familiar with the word processing system used in the office and

thus would prepare most of her own correspondence, memorandum, and drafts.

4. That your Affiant is well acquainted with Clyde Bellecourt, the Plaintiff herein, as Mr. Bellecourt has been in our office on many occasions both in connection with this action and in connection with various activities and organizations he is affiliated with in the American Indian community, as to which our office has rendered legal services.

5. Your Affiant was aware that in November 1988 a draft of a proposed Request for Administrative Remedy was prepared by our office for review by Clyde Bellecourt. To the best of your Affiant's recollection, the draft narrative associated with the proposed submittal was typed by Margaret Penn, while your Affiant typed the cover letter addressed to Associate Warden Olson of the Federal

Medical Center at Rochester. . The draft of the original letter was dated November 9, 1988.

6. Your Affiant remembers Mr. Bellecourt being present in our office several weeks after the draft letter was initially typed. Your Affiant recalls that at that time Mr. Leventhal expressed the belief that the administrative submittal should be completed and stated that he had reviewed the draft with Clyde Bellecourt and made certain additions and corrections to the draft to the draft of the narrative. The draft with corrections was seen by your Affiant and is attached to the Affidavit of Larry Leventhal. Your Affiant remembers that changes in the narrative on the computer program were completed by Margaret Penn.

7. Margaret Penn made inquiry of your Affiant as to where in the

computer programming the draft letter originally dated November 9, 1988 to the Associate Warden at the Federal Medical Center, Rochester, was located. Your Affiant checked certain listings for Ms. Penn and was unable to advise as to where, on the computer disk the letter was situate. Your Affiant recalls Ms. Penn stating that there were no changes other than the date, and that the date could be amended by the use of white out and the typewriter. Your Affiant observed Ms. Penn completing this process.

8. Your Affiant remembers joking around somewhat with Ms. Penn concerning her alignment of the date line on the original letter.

9. After the Request for Administrative Remedy was revised and printed, your Affiant was given the documents by Ms. Penn, and asked to make

photocopies of the same. Your Affiant was informed that several photocopies were needed for our file, and further that a photocopy should be sent to Mr. Bellecourt as he had to leave our office before a copy could be prepared for him.

10. Your Affiant photocopied and prepared the envelopes for mailing. It is your Affiant's belief that manila envelopes with labels were used in this mailing, as your Affiant usually did not fold documents that she believed to have particular legal significance.

11. Your Affiant prepared the envelope for mailing, using the name and address that appeared on the redated correspondence. The address was prepared as follows:

Associate Warden (Programs)
Federal Medical Center, Rochester
U.S. Department of Justice
Federal Bureau of Prisons
Rochester, MN 55901

The label was specified as being to the attention of Associate Warden Olson.

12. Your Affiant following photocopying, would have weighed the envelope in question on the postage scale we have and affixed the proper postage, as such was and is the common practice of our office.

13. The envelope addressed to the Associate Warden, (Programs), of the Federal Medical Center, Rochester would have been placed in the out-going mail tray where mail is situated until it is placed in the mailbox in front of the building. It was and is your Affiant's practice to carry mail with her when she leaves the office, and to deposit the same in the mailbox in front of the Sexton Building located at 529 South 7th Street in Minneapolis. In instances where your Affiant stays late at the office, past the

pick-up time of 5:00 p.m. your Affiant takes all mail that is ready for mailing to the mail box, shortly prior to 5:00 p.m., to assure its pick-up.

14. Your Affiant has an independent recollection of mailing the Administrative Claim in question, as your Affiant recalls Mr. Leventhal making inquiry as to whether such mailing was accomplished and your Affiant assuring him that it was.

15. Your Affiant is certain that the above mailing occurred on November 29, 1988. Your Affiant has examined the office files and correspondence dated November 29, 1988, with the original printing of the correspondence in the file specifying November 9, 1988, upon which the handwriting of Margaret Penn is affixed noting the revised date to be the "29th".

FURTHER YOUR AFFIANT SAYETH NOT.

Dated:_____ /S/
Lynn Solberg

Subscribed to and sworn to before me
this ____ day of _____, 1991.

/S/
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt, Plaintiff, v. United States of America et al., Defendants.	)	**AFFIDAVIT OF LARRY B. LEVENTHAL**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

LARRY B. LEVENTHAL, being first duly sworn on oath, states and alleges as follows:

1. That your Affiant is an attorney at law, duly licensed to practice law within the State of Minnesota and admitted to this Court.

2. That your Affiant is one of the attorneys for Plaintiff, Clyde Bellecourt, in the above captioned matter.

3. That since this action was filed, your Affiant has periodically attempted to locate a physician with experience and/or a specialty in the treatment of cardiac problems. Your Affiant has spoken to at least eleven (11) such specialists, as compiled within your Affiant's notes. In each instance, your Affiant, verbally outlined to the respective physician, the background of Plaintiff's claim associated with initial lack of diagnosis or treatment of his heart attack on September 16, 1987. Your Affiant was informed by all or virtually all of the doctors, until speaking with Dr. Russell Vincent Luepker, that the respective doctor did not care to become involved in offering testimony in a public manner against another physician. At least three (3) physicians respectively advised your Affiant that they would not

wish to participate as an expert witness, as to actions of another physician, in a matter that would involve a well known person, such as Clyde Bellecourt. At least two (2) of the physicians advised your Affiant that they believed that such a case would receive a great deal of publicity, and that they would not wish to be associated with such publicity.

4. In addition to the physicians specified in the preceding paragraph, your Affiant attempted to contact several other physicians with a specialty in cardiology concerning potential availability as an expert witness and either spoke with a secretary or left a message on an answering machine as to the purpose of your Affiant's call, but did not receive a return call.

5. That it is your Affiant's view that the difficulty of finding an

expert witness arose largely from the Plaintiff's status as being a publicly known and well recognized individual, and that such provides reasonable excuse for failing to comply with the specified time limits in Minn. Stat. §145.682.

6. On or about January 10, 1991, the Federal Defendants filed a motion in this matter seeking an order directing Plaintiff to comply with the requirement of filing an expert affidavit within 10 days of a hearing then scheduled for January 24, 1991. Shortly thereafter, your Affiant was advised by Assistant United States Attorney Lonnie Bryan that the motion was being canceled and Mr. Bryan asked your Affiant if he would be able to provide the expert affidavits and answer the interrogatory questions associated with expert testimony in the

near future. Your Affiant stated that he would be directing great effort to do so.

7. On January 23, 1991, your Affiant spoke with Dr. Russell Vincent Luepker who is with the School of Public Health at the University of Minnesota and a Professor of Epidemiology in Medicine at the School of Public Health and Medical School of University of Minnesota. Dr. Luepker indicated that he would be willing to review available medical records, and thereafter speak to your Affiant, concerning the possibility of his service as an expert witness in this matter. Your Affiant wrote to Dr. Luepker on January 24, 1991, and sent to him copies of available medical records. On January 26, your Affiant again spoke with Dr. Luepker by telephone. In a subsequent telephone conversation of January 29, 1991 Dr. Luepker agreed to serve as an expert

witness in this matter. An appointment was made by your Affiant to meet with Dr. Luepker on February 5, 1981. Defendants' motions in this matter were served on January 31, and February 1, 1991 respectively.

8. The Affidavits of Expert Review as set forth in Minn. Stat. §145.682 were prepared by your Affiant and served upon counsel for the Defendants on February 7, 1991. These Affidavits are attached hereto as Exhibit A and Exhibit B, respectively.

9. Following your Affiant's meeting with Dr. Luepker, your Affiant revised the answers by Plaintiff to the Interrogatories of Defendants to provide requested information on the views and background of Plaintiff's expert witness. Plaintiff's Amended Answers to the

Interrogatories of Defendants are attached hereto and identified as Exhibit C.

10. It is your Affiant's belief after reviewing facts, circumstances, and caselaw available to your Affiant, that expert testimony is not necessary to establish a prima facie case in this matter. The contention of Plaintiff as to medical neglect is, that he reported sharp chest pains and shortness of breath, along with his belief that he was having a heart attack, to the physician at the Federal Medical Center, Rochester, who was attending to medical needs of prisoners. Further Plaintiff asserts he requested an electrocardiogram and that nothing was done for him except that he was given antacid. Should a jury believe these facts, an expert's opinion as to the propriety of testing for a heart attack when such symptoms are reported and/or

affording prompt treatment in such circumstances, is not, in your Affiant's view, necessary for prima facie case.

11. The affidavits specified by Minn. Stat. §145.682 were prepared and served, and a motion for expansion of time filed, out of a desire to most thoroughly protect the interests of Plaintiff rather than through any belief that expert testimony is necessary to present a prima facie case.

12. Your Affiant does not believe that late filing the aforementioned affidavits is prejudicial to Defendants. All the Defendants, until several months ago were represented by the Office of the United States Attorney, and the United States at all times has had, to your Affiant's belief, full and total access to all medical and administrative records associated with Plaintiff during

the period of his incarceration which continued until approximately 8 months following his heart attack. Further discovery cutoff is not scheduled until June 1, 1991, thus permitting more than adequate time for full discovery procedures to be utilized by Defendants as to expert testimony as with other aspects of this case.

13. The date for discovery cutoff was stipulated to by counsel for all parties with this Court issuing an Order providing for a discovery cutoff of June 1, 1991. A copy of this Order is attached hereto as Exhibit D.

14. Margaret Penn, an attorney who formerly practiced with your Affiant, communicated, both in writing and by telephone, with officials of the Federal Medical Center, Rochester and Federal Bureau of Prisons concerning their

procedures associated with the submittal of an administrative claim, and received forms which were utilized in the submittal of a claim.

15. On November 7, 1988, your Affiant met with Plaintiff and provided him with a copy of a proposed submittal. Mr. Bellecourt reviewed it briefly and it was agreed that he would take these proposed documents home in order to review them in greater detail and advise as to any revisions.

16. On November 29, 1988, Mr. Bellecourt was at your Affiant's office on another matter. Your Affiant inquired of Mr. Bellecourt whether he had reviewed the Administrative Claim draft. Mr. Bellecourt stated that he had, but not in full detail. Your Affiant specified to Mr. Bellecourt that your Affiant believed the Administrative Claim should be

submitted without delay, and suggested that Mr. Bellecourt and your Affiant review the proposed document at that time with any necessary amendments being made, utilizing our office computer, with the claim being sent that day. Your Affiant and Mr. Bellecourt did review the draft and your Affiant made handprinted corrections and additions as suggested by Mr. Bellecourt. A copy of this document bearing your Affiant's handprinted revisions is attached hereto as Exhibit E. The first page of the document consists of correspondence which has pencil markings noting the date "29th" with the date being circled indicating this date was to replace the original date of November 9, 1988. The handwritten word "copy" also appears. Your Affiant has sent a photocopy of this document to Margaret Penn who is now practicing in North

Dakota. She has advised your Affiant that the handwritten inscriptions are indeed in her handwriting.

17. Because your Affiant wanted to make sure that the Administrative Claim was mailed without further delay, your Affiant requested that a final version incorporating the corrections be printed. This was accomplished by Margaret Penn as to the main narrative. Ms. Penn is proficient in the use of computers and usually did her own typing. She was unable, however, to find the letter to Associate Warden Olson on the computer and thus, since no corrections were made on this page, the original date was "whited out" with November 29 being typed in.

18. Mr. Bellecourt executed the documents before he left the office, but as he had other commitments and stayed

longer than he had anticipated, he asked that copies be mailed to him.

19. Your Affiant requested his secretary, Lynn Solberg, to make copies of the Administrative Claim and to assure that the original was promptly mailed, with a copy being sent to Mr. Bellecourt. Your Affiant later checked the box, maintained by our office, for placement of outgoing mail, and noted that an envelope addressed to the Federal Bureau of Prisons was in the box and was stamped, ready to be mailed. Your Affiant remembers checking as to whether the Administrative Claim was thereafter mailed and your Affiant was assured of such mailing. Your Affiant had been mildly annoyed that 20 days had passed, since he originally reviewed the draft with Mr. Bellecourt during which the document had not been analyzed, and thus your Affiant

specifically checked on the progress of its preparation and mailing.

20. It was the responsibility of Lynn Solberg to place all outgoing mail in the mailbox directly outside of the front door of the Sexton Building, wherein our office is located, each day before she left for home. Your Affiant has known Ms. Solberg to be quite diligent and reliable as to such mailings.

21. Your Affiant spoke with Plaintiff within several days of the mailings on November 29, 1988, at which time Mr. Bellecourt raised some question associated with the Administrative Claim by making reference to his copy which was mailed to him on November 29, 1988, and thereafter received.

22. Your Affiant was not, following the mailing of the Administrative Claim, advised by Mr.

Bellecourt of the receipt of any response from the Federal Medical Center, Rochester or the Federal Bureau of Prisons. Your Affiant, along with attorney Douglas Hall, were specified within the correspondence of Mr. Bellecourt as attorneys for Mr. Bellecourt, and neither of us received any communication on behalf of the institution or its officers. Your Affiant was not, however, surprised and did not expect that either Mr. Bellecourt, or his representatives, would receive any response. In fact, your Affiant had advised Mr. Bellecourt that your Affiant believed that his administrative submittal would be ignored and that it would be necessary to file legal action in United States District Court and that such action could be pursued 6 months from the date of the Request for Administrative Relief.

23. Your Affiant in pretrial interrogatories, now outstanding, makes inquiry to the Federal Defendants as to the procedures for receipt and processing of administrative claims, the individuals responsible for such, policies in effect, and other matters which bear directly on the allegation by the Government Defendants that they did not receive Plaintiff's Request for Administrative Relief. If necessary, these interrogatories will be followed by depositions. As discovery has not yet been concluded, a factual question as to the receipt of this document remains, if the present record does not sufficiently illustrate that the document was indeed received. Further, factual issues remain as to other matters upon which the Defendants would have the Court determine summary judgment and inquiries are made as

to such within Plaintiff's pending Interrogatories and Request for Production of Documents to the parties. Such documents are attached and collectively presented as Exhibit F.

24. Your Affiant has received by mail, the Affidavit of Reverend Thomas James Ponchik concerning a conversation Reverend Ponchik had with Defendant Prison Guard Lieutenant Cliff Friese concerning Mr. Bellecourt's condition when Plaintiff was experiencing his heart attack, and the failure of Dr. Wynne to follow standard procedures. This document is attached hereto as Exhibit G.

25. All significant events associated with Mr. Bellecourt's cause of action occurred while he was an inmate within the Federal Bureau of Prisons located at Federal Medical Center, Rochester, or while being treated at St.

Mary's Hospital, under guard by prison authorities. While the request for administrative relief submitted by Mr. Bellecourt does not set an estimated value on Mr. Bellecourt's loss, the document is very complete in its discretion of events and Mr. Bellecourt's position as to such. The document certainly identifies the incident and the nature of Mr. Bellecourt's Request for Redress. To the best of your Affiant's knowledge and belief, all records associated with the event were, generated by, or under direction of, Federal officials; and all such records have, at all times, been under government control. Any monetary specification of value associated with Mr. Bellecourt's loss would, in your Affiant's view, provide far less information, as to the nature and extent of his claimed

damages, than was at the time already under government control.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: Feb. 7, 1991 /S/
Larry B. Leventhal

Subscribed to and sworn to before me this 9th day of February, 1991.

/S/
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt, Plaintiff,	)	**AFFIDAVIT OF EXPERT REVIEW**
v.	)	
United States of America, et al.,	)	
Defendants.	)	

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

LARRY B. LEVENTHAL, being first duly sworn on oath, states and alleges as follows:

1. That your Affiant is one of the attorneys for Plaintiff in the above-captioned matter.

2. The facts of this case have been reviewed by your Affiant with an expert whose qualifications provide a

reasonable expectation that the experts opinions could be admissible at trial.

3. In the opinion of this expert one or more Defendants deviated from the applicable standard of care and by that action caused injury to the Plaintiff.

4. This Affidavit is submitted pursuant to Minnesota Statute §145.682, Subd. 2 and Subd. 3.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated:_____ _____s/_____
Larry B. Leventhal

Subscribed to and sworn to before me
this ____ day of _____, 1991.

_____s/_____
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt, Plaintiff, v. United States of America, et al., Defendants.	)	**AFFIDAVIT OF IDENTIFICATION OF EXPERT**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

LARRY B. LEVENTHAL, being first duly sworn on oath, states and alleges as follows:

1. Your Affiant is one of the attorneys representing Plaintiff Clyde H. Bellecourt in the above-captioned matter.

2. Plaintiff expects to call as an expert witnesses at trial to testify

with respect to the issues of malpractice, causation, and other issues, Dr. Russell Vincent Luepker. Dr. Luepker is the Director of the Division of Epidemiology, School of Public Health, University of Minnesota and a Professor of Epidemiology and Medicine at the School of Public Health and Medical School of the University of Minnesota.

3. That your Affiant has been provided by Dr. Luepker with a copy of his resume containing biographical data and an extensive list of publications. A copy of this document is attached hereto as Exhibit A. The resume is dated October, 1990. Since that time, effective February 1, 1991, Dr. Luepker has been appointed Director of the Division of Epidemiology, School of Public Health, University of Minnesota.

4. Your Affiant has furnished, to Dr. Luepker, medical records relating to the Plaintiff, obtained from the Federal Defendants and from medical providers. Your Affiant has reviewed these documents with Dr. Luepker and believes him to be well informed as to the various aspects of Plaintiff's care and treatment at issue herein.

5. No other expert witnesses, apart from Dr. Luepker, have been identified at present.

6. The substance of facts and opinions upon which Dr. Luepker is expected to testify is set forth below with the opinion, to which he is expect to testify, being specified, and thereafter, a summary of grounds for such opinion.

A. **OPINION**

Prior to the episode of September 16, 1987, Plaintiff

was not affected by noticeable heart or artery damage.

SUMMARY OF GROUNDS FOR OPINION

A physical examination was conducted of Plaintiff at the Federal Medical Center at Rochester on May 5, 1987, which disclosed no such damage. Mr. Bellecourt continued to be confined at said institution from the date of the aforementioned examination until the episode of September 16, 1987. The institution continued to maintain medical records pertaining to Mr. Bellecourt, and no reports concerning possible coronary episodes are contained in his medical records during this interim period.

B. **OPINION**

Plaintiff suffered a myocardial infarction (heart attack) at approximately 12:30 a.m. - 1:00 a.m. on September 16, 1987.

SUMMARY OF GROUNDS FOR OPINION

The medical records and charts of the Federal Medical Center at Rochester clearly show that a myocardial infarction occurred, with resultant damage. Mr. Bellecourt's complaints, which he first presented at approximately 12:30 a.m., or shortly thereafter, on September

16, 1987, are consistent with the onset of the episode.

C. **OPINION**

The examining physician deviated from the normal standard of care of the medical profession in attending to Mr. Bellecourt's reported condition.

SUMMARY OF GROUNDS FOR OPINION

Mr. Bellecourt reported pressure and pain in his chest area and shortness of breath which should have led any examining physician to suspect a myocardial infarction. This is particularly true of a fifty-two (52) year old male, who has a history of smoking and a family history of heart disease. Given the danger to both life and vital organs posed by a myocardial infarction, the normal standard of medical care would dictate conservative precautions, assuming such an episode, until reliable evidence was available that such was not occurring.

Normal standard of care would have directed that an electrocardiogram be utilized to determine what activity might be occurring. The patient should have been transported to an electrocardiogram for testing,

or the instrument brought to him. Any sign of a recent or on-going cardiac episode, by the electrocardiogram should have led to immediate hospitalization. Hospitalization would be appropriate even if an electrocardiogram were normal given the reports Mr. Bellecourt made of the on-going episode and his medical history.

The administration of antacid is not an adequate medical response to the symptoms reported by Plaintiff.

D. **OPINION**

Failure to provide treatment until approximately nine (9) hours after the onset of the episode, limited the range of treatment options potentially available to assist Mr. Bellecourt in limiting damage to his heart, arteries and other organs, and to limiting the duration of the episode.

SUMMARY OF GROUNDS FOR OPINION

A number of options were available during the first few hours to limit and to perhaps reverse damage. These included administration of medicines to address blood clotting and other symptoms, and

various surgical procedures including anoplasty, dialysis, by-pass, and catherization.

E. **OPINION**

Mr. Bellecourt did not receive an appropriate level of health care associated with his episode of September 16, 1987, during the hours between his first reported symptoms and his hospital admission.

SUMMARY OF GROUNDS FOR OPINION

Symptoms which Mr. Bellecourt presented suggesting a mild myocardial infarction were essentially ignored and Mr. Bellecourt's medical needs remained unattended throughout the early morning hours following his initial reports. Such a failure of care is not consistent with the normal standards of the medical profession. See, numbers C and D above.

F. **OPINION**

Plaintiff has suffered damage to his heart and arteries as a result of the myocardial infarction he suffered on September 16, 1987. The episode was an anterior wall myocardial infarction. Considerable damage occurred. Mr. Bellecourt's left ventricular ejection fraction

was fifty-six (56%) percent. He had a one hundred (100%) percent mid LAD lesion. He became subject to thirty (30%) percent stenosis of the first obtuse marginal, eighty (80%) percent stenosis of the second obtuse marginal, fifty (50%) percent stenosis posterior descending artery, and thirty (30%) percent stenosis of the mid-right coronary artery.

SUMMARY OF GROUNDS FOR OPINION

The above is contained within Mr. Bellecourt's medical records maintained by the Federal Medical Center of Rochester.

G. **OPINION**

Mr. Bellecourt suffered injury through the failure of the examining physician to deliver an adequate response consistent with prevailing standards of care in the medical profession.

SUMMARY OF GROUNDS FOR OPINION

Apart from physical complications, Mr. Bellecourt suffered pain, trauma and stress throughout the night during the hours before which he saw another physician who do proceed to order appropriate testing and hospitalization. Such stress

and pain itself have a negative impact on a patients condition and, in all likelihood, lead to increased damage.

Medical intervention during the first few hours can limit or reverse damage. There exists a number of medical and surgical procedures that are available. Effective intervention can normally take place if accomplished within the first three to four hours after the onset of chest pain. The failure to accomplish appropriate intervention during this interval is recognized to be harmful and risky to a patient. Thus, immediate medical care is viewed as necessary upon the onset of a myocardial infarction. Increased physical damage to the heart and arteries may increase the likelihood that a future episode will occur, and the likelihood that upon such occurrence an episode will be of greater severity.

H. **OPINION**

An electrocardiogram, if performed shortly after the onset of Mr. Bellecourt's complaints, would have revealed the occurrence of the myocardial infarction and resultant damage.

SUMMARY OF GROUNDS FOR OPINION

The electrocardiogram is designed for this purpose and is widely recognized as being a highly effective instrument. When Mr. Bellecourt was tested upon an electrocardiogram, some hours later, the test did reveal the injury.

I. **OPINION**

The management of the institution where Plaintiff was confined, was remiss if it had not previously informed the examining physician of a tunnel between the area where Mr. Bellecourt was housed and a building containing the electrocardiogram.

SUMMARY OF GROUNDS FOR OPINION

The treating physician specifies in a statement that he was unaware of a tunnel between the area where he examined Mr. Bellecourt and a nearby building where an electrocardiogram was housed. While the existence of rain or the absence of a tunnel is not a proper reason to negate usage of the instrument, a tunnel would have facilitated its usage. A physician who is requested to provide emergency service should be made aware of all facilities associated with potential diagnosis, and

treatment, and given complete information as to the most practical access to such.

J. **OPINION**

The delay of timely treatment of Mr. Bellecourt as to his myocardial infarction following its onset places limitations on the current and future activities of Mr. Bellecourt.

SUMMARY OF GROUNDS FOR OPINION

A more expansive myocardial infarction requires greater prudence by a physician and patient in modifying a patient's daily activities to be consistent with the patients perceived ability to function without unnecessary risk of future injury.

K. **OPINION**

The level of care Mr. Bellecourt received at St. Mary's Hospital, after his admission, was appropriate, and was equal to, or better then, prevailing community medical standards.

SUMMARY OF GROUNDS FOR OPINION

An examination of medical records from St. Mary's Hospital indicates proper

attention to Mr. Bellecourt's needs following his transfer to the hospital.

7. This Affidavit is meant to be responsive to the Affidavits specified at Minnesota Statute §145.682, Subd. 3 and Subd. 4.

8. Your Affiant has composed and read this Affidavit and to the best of your Affiant's knowledge, information and belief, formed after reasonable inquiry, the Affidavit is true, accurate and made in good faith.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated:_____ S/
Larry B. Leventhal

Subscribed to and sworn to before me this ____ day of _____, 1991.

S/
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt,

Plaintiff,

v.

United States of America, et al.,

Defendants.

DEPOSITION OF

JULI W. ALBA

The discovery deposition of JULI W. ALBA, taken at the request of the Plaintiff, pursuant to the Notice, before Ken Dick, Registered Professional Reporter and Notary Public in and for the County of Olmsted, State of Minnesota, at the Federal Medical Center, Rochester, Minnesota, on the 20th day of March, 1991, commencing at 2:55 p.m.

APPEARANCES

MR. LARRY B. LEVENTHAL, Attorney at Law, 420 Sexton Building, 529 South Seventh Street, Minneapolis, Minnesota 55415 and MR. DOUGLAS HALL, Attorney at Law, Legal Rights Center, Inc., 808 East Franklin Avenue, Minneapolis, Minnesota 55404, for the Plaintiff.

MR. LONNIE F. BRYAN, Assistant United States Attorney, U.S. Department of Justice, 110 South Fourth Street, #235, Minneapolis, Minnesota 55401, for the U.S.A.

MS. LAURIE J. MILLER, Attorney at Law, of the law firm of Fredrikson & Byron, P.A., 1100 International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402, for the Defendant Dr. Wynne.

PRESENT: Daryl Kosiak, Esq.

would appreciate if if you would identify it for the witness.

MR. HALL: I understand. I am trying to get her best recollection. Then I will get specific.

A. And the question again is?

Q. (Mr. Hall) Do you have any recollection that you had any knowledge at

any time in the fall of 1988 that Mr. Bellecourt was making a claim for damages because of the heart attack?

A. I think it was reasonable for me to assume that he was probably going to file some action in court with regard to the incident.

Q. But was that a general assumption in the institution or was it just yours?

MR. BRYAN: If you can answer.

A. It's not mine alone, no.

Q. (Mr. Hall) And do you now have any recollection at all that you discussed that assumption with anybody in the fall of 1988?

A. I don't recall any specific discussions regarding the potential litigation.

Q. Do you have a recollection that it was discussed, even though you can't

remember any specifics, just the fact that it was discussed in the fall of 1988?

A. It was a long time ago. Again, the best that I can answer you, I'm not trying to give you a hard time, is that there was a reasonable assumption that this incident could potentially lead to litigation. Now, I don't remember any specific discussions regarding that issue. I think there was a general assumption that this might occur. And I think that is a reasonable assumption.

Q. Yeah. Now, if you will jog your memory on this. Starting with that assumption, do you have an recollection of getting any information that struck you as well, we assume that Bellecourt was going to do it and now he did it?

A. That I got any specific information?

Q. Do you have any recollection that at some point you felt well we assumed he was going to do it and now he has done it?

A. No.

Q. I am trying to get at your state of mind relative to the way you formulate that situation, that it was reasonable to assume that he was going to file a claim. That's the only thing that you -- the only formulation that you can make on that?

A. Yes.

Q. Is it reasonable to assume that if he did file a claim, it would come to your attention in the late fall of 1988?

A. Are we talking about an administrative remedy or litigation?

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt,

Plaintiff,

v.

United States of America, et al.,

Defendants.

DEPOSITION OF

DR. DANIEL FOSTER

The discovery deposition of DR. DANIEL FOSTER, taken at the request of the Plaintiff, pursuant to the Notice, before Ken Dick, Registered Professional Reporter and Notary Public in and for the County of Olmsted, State of Minnesota, at the Federal Medical Center, Rochester, Minnesota, on the 10th day of April, 1991, commencing at 10:10 a.m.

APPEARANCES

MESSRS. LARRY B. LEVENTHAL and MICHAEL C. HAGER, Attorneys at Law, of the law firm of Larry Leventhal & Associates, 420 Sexton Building, 529 South Seventh Street, Minneapolis, Minnesota 55415, for the Plaintiff.

MR. LONNIE F. BRYAN, Assistant United States Attorney, U.S. Department of Justice, 110 South Fourth Street, #235, Minneapolis, Minnesota 55401, for the U.S.A.

PRESENT: Daryl Kosiak, Esq.

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MR. BRYAN: Ken, we are going to enter into a stipulation at this point that I would like to have you put at the beginning of all the depositions that we will be taking today. As I understand it,

the parties are in agreement here that, one, these depositions are proceeding by notice. Second of all, that to the extent that the individuals are not present or employed at FMC Rochester, that the deposition can proceed by telephone, contrary to the procedure identified in the Federal Rules of Civil Procedure. In other words, the Federal Rules of Civil Procedure provide that the court reporter should be present at the location with the witness. That portion of the Federal Rules is, based upon the agreement of all the parties. being suspended. And that the court reporter can be present here in Rochester, where there is a speaker phone, even though the witness being deposed by the telephone is present elsewhere. Is that agreeable with you, Mr. Leventhal?

MR. LEVENTHAL: Yes, that's agreeable.

DR. DANIEL FOSTER

called as a witness, first duly sworn, on oath testified:

CROSS-EXAMINATION

BY MR. LEVENTHAL:

Q. Good morning, Dr. Foster.

A. Good morning.

Q. My name is Larry Leventhal. I am one of the attorneys for Clyde Bellecourt. I have a few questions of you this morning.

A. Sure.

Q. How long have you been associated with FMC Rochester?

A. Since August of '87.

Q. What position do you currently have?

A. Chief of Psychology.

Q. Were you Chief of Psychology since you came aboard in August of '87 or

is that a position you achieved more recently?

A. I came as the chief, and temporarily left and went to Washington, D.C., where I had another position in the central office and then returned.

Q. What was the period of your temporary absence?

A. It was February through July of '88. Was it '88? '89. Make that '89.

Q. As chief of psychology, what are your duties?

A. A variety of duties. Supervising psychology services. And also, more broadly, working as assistant to the associate warden for mental health. We provide psychological services to the institution. And also I am in charge of suicide prevention, employee assistance programs. I am part of the executive committee for the medical staff. I am

involved in a few of the medical committees. I am chairman of the Mental Health Strategic Planning Group. I am also in charge of the American Indian Self Help Program that we have developed since my arrival.

Q. Okay. Did you become acquainted with Clyde Bellecourt while he was in the institution?

A. Yes, I did.

Q. Was he involved at all in the American Indian Self Help Program?

MR. BRYAN: I am going to object as irrelevant. But you can go ahead and answer, Dr. Foster.

A. Mr. Bellecourt was active with what at that time was just termed American Indian Spiritual and Cultural Society. And in fact served as the chairman or chief of that program. While Bellecourt was here we hadn't yet formed the Self

Help Program. It was just in process. So he was instrumental in developing or in contributing ideas in helping us to link with volunteer resources and so forth to develop the program.

Q. (Mr. Leventhal) In what manner was he helpful in the development of this program?

MR. BRYAN: I am going to object as irrelevant. I'm going to instruct the witness not to answer.

Q. (Mr. Leventhal) In any case, through work which Mr. Bellecourt did over which you had some supervision you became acquainted with him?

A. Yes, I did.

Q. Did you become aware of the occurrence of the heart attack that he experienced in September of '87 and the fact that he was moved and treated at St. Marys Hospital?

A. Yes, I was aware of that.

Q. Did you become aware of contentions that he made shortly after his heart attack, that he believed that he was not properly attended to when he had his initial heart attack problems?

A. Yes, I was.

Q. You are a member, are you not, of the group supervisor -- of the group supervisors and leaders here at the institution?

A. Department heads?

Q. Department heads, yes.

A. Yes.

Q. And do you attend department head meetings on a periodic basis?

A. Yes, I do.

Q. Were you attending department head meetings in December 1988?

A. Yes, I was.

Q. Would you have attended a meeting held on December 27th, 1988, if the minutes show you in attendance at that meeting?

A. If the minutes showed me, I would have been there.

Q. Did you, at any time prior to the -- well, let me rephrase that.

Did you become aware, during or about November -- excuse me, September 1989, that Mr. Bellecourt filed a legal action in United States District Court regarding claimed lack of attention to his heart attack?

A. I don't know that I was aware that he filed it. I know that I had heard speculation that it would be filed or that it was likely coming. When I heard that speculation, I couldn't say.

Q. Now, prior to September of '89 then, did you become aware at any time

that Mr. Bellecourt had made a claim within the institution that related to his belief that he did not receive the proper attention that he should have had?

MR. BRYAN: Are you referring to a written claim or a verbal claim?

MR. BRYAN: Are you referring to a written claim or a verbal claim?

MR. BRYAN: Any type of a claim that may have come to the witness's attention.

MR. BRYAN: You are not referring to the exhibit?

MR. LEVENTHAL: Not at this time, although I will in a subsequent question.

MR. BRYAN: Okay. If you can answer the question, go ahead.

A. I was certainly aware, both from newspaper articles at the time of Mr. Bellecourt's hospitalization, and again, a

vague recollection of some comments among departmental heads or executive staff, I couldn't even say who, after that, that he wouldn't be surprised if a lawsuit came. That's something that's not infrequent in this setting for at least the possibility of it. And Mr. Bellecourt did speak with me on at least one occasion of the sequence and of his perception of the late treatment or inattentive treatment on the part of medical staff.

Q. Was Mr. Bellecourt's contention that he was not properly treated when he had a heart attack the subject of conversation, and a claim made by him subject of conversation, at a department head meeting in December of '88.

MR. BRYAN: Now, again are you asking about the written claim or are you talking about anything else?

MR. LEVENTHAL: A claim in whatever form it may have come to peoples attention such that they talked about it.

MR. BRYAN: Whether or not it was discussed at the department head meeting in December of '88 was the question?

MR. LEVENTHAL: Yes. At the meeting or when people were gathered just before or just after the meeting or gathered together for the meeting.

A. I had not seen a written claim. The first written claim I saw was this here. And I couldn't say if it was at that meeting -- I couldn't say if it was November, December or January of that year. I would say it wouldn't have been after that because I was primarily traveling and commuting to Washington, DC, and traveling around the country in my other duties within the Bureau between

that time and July of the next year. But I do recall it being addressed in kind of an aside comment prior to a department head meeting. And I don't even recall who said it. I don't -- again a vague recollection is the comment was not even directed toward myself. I just happened to be one of a few people standing there. I don't recall who said it. I don't recall what was stated, other than just a vague recollection that Mr. Bellecourt was filing. That was all. Not a reference to a paper. Not a reference to a file. Just that the lawsuit was anticipated.

MR. BRYAN: Do you know when that conversation occurred even?

THE WITNESS: My recollection is either late fall or early winter. But I don't even have a month. It could have been October, November, December. The reason I say that it wouldn't have been

after January is because I wasn't -- while I was still in and out of the institution and I was still living in Rochester, I was commuting from that time on. So I wouldn't have attended the department head meetings any longer.

Q. (Mr. Leventhal) So to put a fix on the year, this would have been then October, November, December of 1988, or possibly January of 1989?

A. Correct. Now, again the comment could have been merely speculation. I don't -- it's a very vague recollection. I do not recall the person saying it. And I certainly never saw anything subsequent and read this.

Q. You have before you a document that's labeled exhibit 1, deposition exhibit 1.

A. Yes, I do.

Q. And I will ask you to take a quick look through that.

A. I received a copy of this document last evening and was able to review it this morning.

Q. Okay. What I wanted to ask you is, during the time frame you have been speaking of, of September, I guess October of '88 through January of '89, had you, during that time frame or any time prior to that, seen the document that you are now looking at?

A. No.

Q. You had not?

A. No.

Q. Had you seen that document at any time prior to September 1989?

A. No. No, I didn't see that in September either. I think is September of 1989, and it's only upon Mr. Kosiak refreshing my memory, I think was the

first that I was aware that this document existed.

Q. The date on the document is what?

A. November 29th, 1988.

Q. And that would be, would it not, within the interval in which you recall hearing some talk concerning Mr. Bellecourt's claim at a department head meeting or prior to a department head meeting?

MR. BRYAN: Are you again referring to a written claim having been received or are you just talking about a verbal claim made by Clyde Bellecourt? Or what exactly are you referring to as a claim?

MR. LEVENTHAL: My question goes to the date November 29, 1988, being within the interval that the doctor --

MR. BRYAN: That isn't the question. The question is what do you mean when you use claim?

MR. LEVENTHAL: Let me rephrase the question.

Q. (Mr. Leventhal) You have a document in front of you that's dated November 29th, 1988?

A. Yes, I do.

Q. Is the date November 29, 1988, within the period of time that you recall reference being made prior to a department head meeting to Mr. Bellecourt's claim that he was injured at FMC Rochester through proper attention not being paid in his view to his heart attack?

MR. BRYAN: I am going to object question as, one, it's vague. Secondly, it's a mischaracterization of the witness's testimony. As I recall the witness's testimony, he referred to the

conversation of an anticipated lawsuit. He never referred to a claim. But if you can answer that question, please go ahead.

A. This is dated within the time frame of which my recollection is that an anticipated claim was discussed.

Q. (Mr. Leventhal) So it would be likely, would it not, that such a reference to Mr. Bellecourt's anticipated actions would be a product of the writing that you now have before you?

MR. BRYAN: Objection. There is a lack of foundation to the question. Second of all, it calls for speculation on the part of the witness. If you feel you can answer, go ahead.

A. Could you repeat the question, please.

Q. (Mr. Leventhal) Yes. Given the writing that's before you dated November 29, 1988, and the fact that you recall

comments made of the nature you have described during the period you have described, it is likely, is it not, that the comments you heard derived from the fact that somebody received and saw the document that you have in front of you?

MR. BRYAN: Object. I am going to object to the question on the grounds that it assumes facts that are not into evidence. Second of all, there is lack of foundation for the question. Third of all, it's improper examination of a witness. It asks for an improper opinion from the witness. But if you feel that you can answer the question, go ahead.

A. I couldn't say it's likely. I could say it's possible. I don't know. I was not -- I did not hear mention of a written claim.

Q. (Mr. Leventhal) What you heard at that meeting or prior to that meeting

is, I take it, consistent with the presentation that's made in the exhibit in front of you? You might take a couple minutes to look through it if you would like.

MR. BRYAN: I object to the question as vague. You can go ahead and answer if you can. If you even know the answer.

A. The issue was clearly that Mr. Bellecourt was contending that improper treatment had been received leading to permanent impairment and that a civil remedy was being sought.

Q. (Mr. Leventhal) That's what the document you have in front of you addresses?

A. And that is consistent with this document, yes.

Q. Do you recall any other conversations with staff people here at

FMC Rochester involving Mr. Bellecourt following the date of the comments you are making reference to?

A. No, I do not.

Q. Do you recall, on the occasion that the comments you have made reference to, occurring --

A. Excuse me. That last answer. With exception to when Mr. Kosiak first addressed formally the receipt of -- I am going to assume that it was this.

Q. That was within the past several months?

A. Well, that was in, I think, September of '89.

Q. I see. Right. Meaning the time of the lawsuit?

A. Yes.

Q. Okay. At that time you became aware that there was a lawsuit?

A. Formal document. Yes.

Q. Well, then let me ask you, from the period in which you recall the comment prior to a department head meeting up till the time that Mr. Kosiak spoke with you or you heard from him concerning the lawsuit itself, do you recall any other conversation that you participated in or overheard involving staff members at FMC Rochester concerning Mr. Bellecourt's claim?

A. I do not.

Q. Do you recall any conversation concerning Mr. Bellecourt at all during that period of time?

A. I do not.

Q. Okay.

A. I believe Mr. Bellecourt had left the institution the previous July, of 1988. And I don't remember any other words other than that vague late fall, early winter comment.

Q. Understanding that you do not remember who made the comment that you are reflecting upon, do you remember anybody else who was in your presence at the time that that comment occurred? In other words, someone else who was in a position to also hear it?

A. I don't. I don't. As I tried to think of different department heads, I can only think of who wouldn't have been here because they were not physically present at the time. But I don't recall specifically who was.

Q. And I take it then that you did not discuss Mr. Bellecourt at that meeting or following that meeting with anybody?

A. No.

Q. Would it be the case that that comment was made prior to the formal meeting and was not a formal item on the agenda?

A. I do not -- I believe it was not a formal item on the agenda. And it was, again my recollection is, prior to -- prior to the meeting.

Q. You didn't make any notes or writings of meetings in that period of time, did you?

A. No. At times I will make a note as to what I am going to present and will keep that in a form. But I don't -- and I will take a note of something significant for my department to bring back to my staff to share with them. But I certainly made no note addressing anything to do with Mr. Bellecourt. If I could add one more word.

Q. Please.

A. If I would have known of this I probably would have made a note because Sarah Uriste works with us in the Mental Health Department. So if I would have

known she was one of the persons named I would have definitely been alerted to that and inquired further.

Q. Prior to the formal lawsuit itself, did Ms. Uriste at any time talk to you about the incident regarding Mr. Bellecourt?

MR. BRYAN: I am going to object as irrelevant. You can go ahead and answer yes or no.

A. Through the present time she has not mentioned it.

MR. LEVENTHAL: I have nothing further. Thank you.

MR. BRYAN: Doctor, I have a few questions for you.

THE WITNESS: Sure.

DIRECT EXAMINATION

BY MR. BRYAN:

Q. I want to focus on this conversation you overheard for a couple of seconds, okay?

A. Yes.

Q. As I understand it, one, you cannot tell us who made the statement?

A. That's correct.

Q. Okay. You cannot tell us who was present when the statement was made, is that correct?

A. That's correct.

Q. You cannot tell us with any precision when that statement was made, is that correct?

A. That's correct.

Q. Were you aware, in the fall of 1987, that a local newspaper had reported contentions of improper medical care made by Clyde Bellecourt?

A. I was. I discussed that with the warden.

Q. Okay. The conversation that you were discussing with Mr. Leventhal, that was something that you overheard, is that correct?

A. Yes. It was-- as I recall, I was sitting in the warden's conference room awaiting the meeting. And it was a conversation between people sitting there waiting for the meeting to start. Everyone hadn't arrived yet. And I was not paying a lot of attention. It wasn't a secretive kind of an exchange. It was just a couple comments made between persons there.

Q. Okay. Did you participate in any investigation of a formal claim having been made by Clyde Bellecourt on the subject that we have discussed today?

A. No, I did not.

Q. Were you aware of any investigation of a formal complaint from

Clyde Bellecourt of the medical care that he received?

A. No, I was not.

Q. Were you aware that Clyde Bellecourt had filed -- I believe there were two other BP-9s while he was at the institution?

A. No, I did not. When I met with Clyde I met with him strictly dealing with either personal issues in kind of a counseling relationship or with the Indian group issues. He never did bring to me any of his own legal or administrative remedy issues.

Q. Okay. And it is your -- do I also understand that it is your characterization of the conversation, that it did not reference any formal complaint or written claim having been received ont hat subject?

A. My characterization or my recall, vague as it is, was to anticipate a lawsuit. It certainly was not clear whether there was anything formal written or it was just something verbalized. It was a speculative type of comment, from my perspective. I didn't know it was a fact or had substance to it.

Q. Okay. One of the things I am trying to get at with the question is, in the Federal Tort Claim Procedures, as you may know, one of the steps that a person has to follow to get into court is to have filed a formal written administrative claim with FMC Rochester prior to filing the lawsuit. Okay. In your characterization of the conversation that you overheard, okay, was it your understanding that any formal written administrative claim had been received at FMC Rochester at that time?

A. I have no recollection of such a statement or of reference to such a filing.

Q. And your earlier -- but am I correct that it is your recollection that the general nature of the conversation which you overheard, was that the people may anticipate a lawsuit being filed in court at some time?

A. Again, with a vague memory, but it would be something like well, we are going to get sued by Bellecourt. Just a comment like that. That was it. No further discussion. No further substance. No reference to this paper or any other tort filing or BP-9 or anything. Just a sentence. Maybe two.

MR. BRYAN: Okay. I have no further questions for the witness. Do you have any more?

MR. LEVENTHAL: Just a couple.

RECROSS EXAMINATION

BY MR. LEVENTHAL:

Q. Dr. Foster, you said you had a discussion with the warden concerning Mr. Bellecourt?

A. (Shakes head).

MR. BRYAN: You have to answer verbally.

A. Yes.

Q. (Mr. Leventhal) What was the nature of that conversation and when did it occur?

MR. BRYAN: I am going to voir dire the witness on this before the question is answered.

Did that conversation with the warden concern or involve a Federal Tort Claim Act or lawsuit arising out of the care and treatment that Mr. Bellecourt had received in September of '87?

THE WITNESS: No.

MR. BRYAN: Then I am going to object to the question and instruct the witness not to answer.

MR. LEVENTHAL: I think your instruction is not properly based and would take very significant exception with that. You have asked the witness in your voir dire whether the conversation was in reference to a Federal Tort Claim Act filing. When in fact, the discussion that occurred may have had a significance associated with such a filing but not have been identified in a conversation as having been a Federal Tort Claim Act filing. The issue that I am addressing in the question is certainly calculated to receive or lead to discoverable information and I believe that the witness should answer.

MR. BRYAN: So?

MR. LEVENTHAL: You continue with your instruction that he not answer the question that was phrased?

MR. BRYAN: I will ask it this way. Did your conversation with Warden Bogan about Mr. Bellecourt in any way involve an administrative claim by Mr. Bellecourt arising out of the medical, care he received in September of 1987

THE WITNESS: No.

MR. BRYAN: I am going to instruct the witness not to answer.

Q. (Mr. Leventhal) What was the approximate date that you had a conversation with Warden Bogan?

A. It would have been while Mr. Bellecourt was still in the hospital.

Q. Was that the sole conversation you had with him?

A. Yes, it was.

Q. Mr. Bryan asked you if you saw a newspaper article at about the time that the heart attack occurred in September of '87.

A. I did.

Q. All right. Now, you didn't see any articles regarding Mr. Bellecourt and anything associated with his heart attack or treatment of it or nontreatment of it the following year, did you, in the fall of 1988?

A. No.

MR. LEVENTHAL: Thank you. I have nothing further.

MR. BRYAN: Doctor, you know the last question in a deposition, I take it. And that is, do you want to read and sign this deposition or would you trust to the accuracy of the court reporter?

THE WITNESS: I will trust to the accuracy of the court reporter.

MR. BRYAN: Thank you.

MR. LEVENTHAL: Thank you.

(The deposition concluded at 10:45 a.m.)

CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF OLMSTED)

BE IT KNOWN that I took the discovery deposition of the witness DR. DANIEL FOSTER, pursuant to the Notice, that I was then and there a registered professional reporter and notary public in and for said County and State; that I exercised the power of that office in taking said deposition; that by virtue thereof, I was then and there authorized to administer an oath; that said witness before testifying, was duly sworn to testify the truth, the whole truth and nothing but the truth relative to the cause specified; that the examination was conducted on behalf of the parties as hereinbefore indicated; that I am not counsel of any party, a relative or employee of any counsel or party connected with the action, nor financially interested in the action; and that the foregoing 21 pages contain to the best of my ability a true and correct transcription of all of the testimony of said witness and of all of the proceedings had on the taking of said deposition.

WITNESS MY HAND AND SEAL this 17th day of April, 1991.

Ken Dick

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt,

Plaintiff,

v.

United States of America, et al.

Defendants.

DEPOSITION OF

JOHN CHRENO

The discovery deposition of JOHN CHRENO, taken at the request of the Plaintiff, pursuant to the Notice, before Ken Dick, Registered Professional Reporter and Notary Public in and for the County of Olmsted, State of Minnesota, at the Federal Medical Center, Rochester, Minnesota, on the 20th day of March, 1991, commencing at 12:20 p.m.

APPEARANCES

MR. LARRY B. LEVENTHAL, Attorney at Law, 420 Sexton Building, 529 South Seventh Street, Minneapolis, Minnesota 55415 and MR. DOUGLAS HALL, Attorney at Law, Legal Rights Center, Inc., 808 East Franklin Avenue, Minneapolis, Minnesota 55404, for the Plaintiff.

MR. LONNIE F. BRYAN, Assistant United States Attorney, U.S. Department of Justice, 110 South Fourth Street, #235, Minneapolis, Minnesota 55401, for the U.S.A.

MS. LAURIE J. MILLER, Attorney at Law, of the law firm of Fredrikson & Byron, P.A., 1100 International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402, for the Defendant Dr. Wynne.

PRESENT: Daryl Kosiak, Esq.

that we recall Mr. Chreno or whatnot. But that just makes sense to me to handle it that way. Is that all right with you, Mr. Hall?

MR. HALL: Yeah, that's fine.

Q. (Mr. Hall) I have forgotten whether I asked you this question. Between August of '87 and September of 88,

did it come to your attention that Bellecourt claimed he had a heart attack in the institution and did not receive prompt medical attention?

A. I cannot with assurety state when that information came into my knowledge. I do remember reading a story in a newspaper article where Mr. Bellecourt did make that claim. I cannot say exactly when I read that.

Q. Is it your best recollection that that information did not come to your attention through official channels in the institution?

A. I cannot say that.

Q. Do you have any recollection of any conversations with other staff members in which that heart attack and the claim of tardy treatment was discussed?

A. I don't have any specific recollection, no.

Q. Did you ever discuss that same situation between those dates with Keith Farrell, to your recollection?

A. Keith Farrell was a counselor in the institution. And I don't think I did, no.

Q. How about Paul Schultz?

A. Paul Schultz was a case manager. No, I did not.

Q. Associate Warden Helman?

A. Not that I can recall talking to Mr. Helman about, no.

Q. Dr. P. Bernatz?

A. Dr. Bernatz. No, I don't.

Q. Is there an executive group among the personnel in the institution?

A. That's correct, there is.

Q. And were you a member of that?

A. Not between September of 1987 and September of 1988.

Q. Were you a member of that group in October, November or December of 1989?

A. Yes, I was.

Q. Let me correct myself. '88?

A. Yes, I was.

Q. And do you recall any discussion in that period in 1988 in the executive group regarding Mr. Bellecourt and the heart attack situation?

A. I don't have any specific independent recollection of that. Other than I recall that there were -- I do remember being involved in general discussions about the claim when the newspaper article came out. But again, I don't know exactly when that came out.

Q. So the newspaper article dealt with the claim, not just the occurrence?

MR. BRYAN: I am going to object to the question as it calls for a legal conclusion.

MR. HALL: Let me rephrase it.

MR. BRYAN: Go ahead an answer.

Q. (Mr. Hall) In October, November or December of 1988, was there discussion in the executive group about a BP-9 submitted by Clyde Bellecourt concerning a heart attack?

A. Not that I can recall.

Q. The newspaper article which you have referred to, did that refer to a BP-9 or an official claim by Mr. Bellecourt in the period of October, November, December of 1988?

A. Not that I recall.

Q. What's your best recollection of what that newspaper article stated?

A. To the best of my recollection it said that Mr. Bellecourt was in the process of filing a lawsuit concerning treatment that he stated he did not

receive while confined at the Federal Medical Center.

Q. And when did you see that in the newspaper?

A. I cannot recall specifically.

Q. Can you recall a year?

A. Unfortunately I can't even recall the year.

Q. Do you recall whether that newspaper article was made a part of his file?

A. No, I don't. I can say that that normally would not be a practice at this facility.

Q. But was it that newspaper article that was the subject of discussion of the executive committee?

A. To the best of my recollection that was discussed. At that point I was a public information officer and part of my -- part of my general responsibility was

reading local newspapers. And if there was an article that seemed to relate to the function or the operation of the Bureau of Prisons or the Federal Medical Center, it was my practice to bring that to the attention of the executive staff.

Q. When did you become public information officer?

A. When I -- simultaneous with my assumption of duties as executive assistant to the warden. And that would have been approximately September of 1988.

Q. And if there was such an article relating to a claim that came to your attention, would you place that article someplace for preservation?

A. To my knowledge the warden's secretary does or has in some cases kept copies of articles for the historical public information reading file.

Q. Has the practice been such that if newspaper stories appear regarding a specific inmate, that those would be maintained in relation to that inmate s records?

A. No.

Q. Why not?

MR. BRYAN: I am going to object to that question as beyond the scope of discovery and not even likely to lead to any permissible discovery.

MR. HALL: Are you in instructing him not to answer?

MR. BRYAN: You can go ahead and answer, if you even know.

A. Well, newspaper articles are not official information. And they have no validity as official information. And as such, as I said, it's not our practice to make them part of the official record of an official central file. It is of

interest to the executive staff in terms of the community perception, for example, or general community interest in occurrences at a facility.

Q. (Mr. Hall) After you saw that newspaper article regarding a claim by Bellecourt, do you recall discussing that with anybody within the institution?

A. As I mentioned earlier, I believe that was the subject of a discussion with the executive staff on or about the date that the article was published in the local newspaper.

Q. Do you recall your being sure that the appropriate people within the executive staff were informed about that newspaper article?

A. I would not make a special effort to route a newspaper article to any or all members of the executive staff. It would be our practice to discuss it with the

people who attended the executive staff the day following publication of the article.

Q. In September, October, November or December of 1988, do you recall who comprised the executive staff?

A. I believe Warden Bogan was still at the Federal Medical Center. I believe that Keith Olson was the associate warden of programs. I believe that David Helman was the associate warden of operations. I was the executive assistant to the warden. And I think at that time that was the basic composition of the executive staff.

Q. Would Mr. Ondahl be a member at that time?

A. As I recall, Mr. Ondahl was a unit manager at the facility. And unit managers are not members of the executive staff.

Q. Was any clerical person assigned to that executive committee?

A. No.

Q. Who is the secretary to the warden who might have maintained a newspaper file in the period September, October, November, December of 88?

A. Well, I believe the warden's secretary at that time was Loretta Stephens.

Q. Is she still connected with the institution?

A. No, she is not.

RESEARCH UNLIMITED
Box 9006, Rochester, Minnesota 55903-9006

May 6th, 1991

OLMSTED COUNTY

CITY OF ROCHESTER

AFFIDAVIT OF RESEARCH RESULTS

I, RAY HOWE, OF ROCHESTER, MINNESOTA, ACTING AT THE INSTANCE OF MR. LARRY LEVENTHAL, ESQ., OF LARRY LEVENTHAL & ASSOCIATES, LOCATED IN MINNEAPOLIS, MINNESOTA DO STATE AND AFFIRM I DID A SEARCH TO LOCATE ANY NEWSPAPER REPORTS APPEARING DURING A PERIOD FROM AUGUST 1ST, 1988 THROUGH MARCH 1ST, 1989 IN NEWSPAPERS PUBLISHED IN THE STATE OF MINNESOTA REFERRING IN ANY WAY TO MR. CLYDE BELLECOURT

STORIES REFERENCING CLYDE BELLECOURT APPEARED IN THE FOLLOWING NEWSPAPERS:

MINNEAPOLIS STAR TRIBUNE
11/29/88, 12/3/88, 12/8/88 AND 2/12/89

THE 11/29/88 STORY MENTIONS MR. CLYDE BELLECOURT IN REFERENCE MEDIATION AND YOUTH GANGS.

THE 12/3/88 STORY REFERRED TO CLYDE BELLECOURT IN REFERENCE TO MEDIATING WITH YOUTH GANGS.

THE 12/8/88 STORY REFERRED TO A McKNIGHT FOUNDATION GRANT

THE 2/12/89 STORY REFERRED TO CLYDE BELLECOURT CONDUCTING A RITE OF FAREWELL AT THE FUNERAL OF A MURDER VICTIM.

ST. PAUL PIONEER PRESS DISPATCH ON 2/12/89 ONLY REFERRED TO MR. CLYDE BELLECOURT DOING THE RITE OF FAREWELL AS IN THE MINNEAPOLIS STAR & TRIB REPORT OF 2/12/89

THESE NEWSPAPERS CARRIED NO STORIES OF ANY SORT REFERRING TO MR. CLYDE BELLECOURT DURING THE PERIOD 8/1/88 - 3/1/89:

ROCHESTER POST BULLETIN
AUSTIN HERALD
DULUTH HERALD
WINONA DAILY NEWS
ST. CLOUD TIMES

THE ASSOCIATED PRESS, THROUGH ITS EDITOR, MR. DAVE PILE, REPORTED THAT NO STORIES ABOUT MR. CLYDE BELLECOURT RAN ON THE AP WIRE WITH ANY REFERENCE TO THE FEDERAL MEDICAL CENTER AT ROCHESTER DURING THE PERIOD IN QUESTION AS MENTIONED ABOVE.

THE SEARCH WAS DONE THROUGH COMPUTER DATABASES CONSTRUCTED BY THE ROCHESTER PUBLIC LIBRARY, DULUTH PUBLIC LIBRARY AND THE ST. PAUL PUBLIC LIBRARY. INFORMATION FOR THE WINONA AND ST. CLOUD NEWSPAPERS WAS GATHERED FROM THE EDITORS OF THOSE ORGANIZATIONS.

FURTHER SAYETH YOUR AFFIANT NO.

/S/
RAY HOWE, DIRECTOR
RESEARCH UNLIMITED

/S/

Subscribed and sworn to before me
this 4th day of September, 1991.

Notary Public, Olmsted County, Minn.
Brenda J. Holtan

Research Unlimited 9/3/91 11:11 PM

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt, Plaintiff, v. United States of America, et al.,	)	SUPPLEMENTAL AFFIDAVIT OF LYNN SOLBERG

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

LYNN SOLBERG, being first duly sworn on oath, states and alleges as follows:

1. That this Affidavit is intended to supplement the Affidavit submitted by your Affiant in this matter on February 20, 1991.

2. That within the aforementioned Affidavit, your Affiant identified herself as being a legal secretary within the law offices of Larry

B. Leventhal & Associates, and described circumstances of the preparation and mailing of a Request for Administrative Remedy submitted on behalf Clyde H. Bellecourt on November 29, 1988.

3. In addition to the duties specified previously, your Affiant opens and sorts the office incoming mail on a daily basis. Your Affiant at no time observed, nor became aware of the return of the aforementioned Administrative Claim by Clyde H. Bellecourt.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: 9/4/91

/S/
Lynn Solberg

Subscribed to and sworn to before me this ____ day of _____, 1991.

/S/
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-89-828

Clyde H. Bellecourt, Plaintiff, v. United States of America, et al.,	)	SUPPLEMENTAL AFFIDAVIT OF LARRY B. LEVENTHAL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

LARRY B. LEVENTHAL, being first duly sworn on oath, states and alleges as follows:

1. That your Affiant is one of the attorneys for Plaintiff Clyde H. Bellecourt in the above captioned matter, and in such capacity has previously submitted his Affidavit to this Court on February 20, 1991.

2. Within the aforementioned Affidavit your Affiant set forth your Affiant's knowledge of the preparation by Plaintiff, your Affiant, and members of the staff of your Affiant's law office of an Administrative Claim on behalf of Mr. Bellecourt for submittal to the Federal Medical Center, Rochester, and the mailing of said claim on November 29, 1988.

3. Since the mailing of the aforementioned claim your Affiant has at no time become aware of the return of said claim by the United States Postal Service.

4. Your Affiant has spoken with Plaintiff and with Margaret Penn, who worked on this matter while an attorney within your Affiant's office and who submitted an earlier Affidavit. Both advised that they did not respectively receive or become aware of the receipt of any return of the claim as submitted.

5. Among the Exhibits being forwarded herein are copies of transcripts of depositions, or partial transcripts, from three employees of the Federal Medical Center - Rochester. The original of the deposition of Dr. Daniel Foster was received by your Affiant and is being filed with the Clerk of Courts. His deposition is reproduced as an Exhibit accompanying Plaintiff's Memoranda. As to many deponents only certain portions of their depositions were ordered. The Exhibits which present materials from the depositions of John Chreno and Juli W. Alba are reproduced from the partial transcripts received by your Affiant.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: Sept. 4, 1991 _____

Larry B. Leventhal

Subscribed to and sworn to before me
this ____ day of _____, 1991.

_____

Notary Public

PARTIAL TRANSCRIPT
OF HEARING BEFORE
DISTRICT COURT

MARCH 1, 1991

- - -

* * *

MR. LEVENTHAL: We cite several others, including Supreme Court authority, regarding the mailing. So I think that, once it is established it is placed in the mail, it is assumed to have been received. Now there's ways of rebutting that. They have submitted affidavits within the past several days by three individuals who say they didn't recall seeing it.

THE COURT: I understand what they have done, but the problem that the court is having -- if in fact Mr. Bryan is right on the presumption, and you can't overcome that presumption, then you're going to lose on that issue.

Likewise, as you say it is, once there is a mailing and you can show that - which is the same issue, I think the usual

kind of service issue - once you can show that you have mailed it -- which I think you have done, and I don't think even Mr. Bryan disagrees with that; you have an affidavit of mailing, your secretary has an affidavit of mailing she has put it in the box, all that's done; I think they probably presume that you have gone as far as you can with that.

But I think his point is that, even with that, you can lose if you can't in fact show that they have received it.

They have gone the extra mile and said, "We didn't receive it" -- but all they have to do is bring it into issue and say, "We didn't receive it" -- but they've gone and given you affidavits and everything else.

But I think you're going to have to develop some proof that is not in the record at this point.

MR. LEVENTHAL: As I suggested in the memo, discovery is necessary and appropriate on that point.

THE COURT: That is why I want to hear you out.

MR. LEVENTHAL: Discovery continues until June 1 by order of the court and by stipulation of the parties. That is indeed an issue. In citing the summary judgment standards we were talking about, in the brief that was submitted by Mr. Stern -- not on this issue, but where he speaks of summary judgment -- the case he cites, which i believe was -- well, I forget what it was, but the case he cites on summary judgment and the quote he makes says "after adequate opportunity for discover" --

THE COURT: You find that language all the time.

MR. LEVENTHAL: That's very frequent

language.

But when there is a period for discovery, that means that there should be that period to be used for discovery.

Now we've asked a number of questions that bear on this issue, and we are prepared to pursue it. We believe it was received. And the affidavits that were received --

Supreme Court, U.S.
FILED
NOV 17 1993
OFFICE OF THE CLERK

No. 93-622

In the

Supreme Court of the United States

October Term, 1993

CLYDE BELLECOURT,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENT DR. ALAN WYNNE

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November 17, 1993

1993 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether an Eighth Amendment claim against a doctor under ***Estelle v. Gamble*** is properly dismissed where the plaintiff offers no evidence to establish the requisite culpable state of mind?

2. Whether the district court properly dismissed a pendent state law medical malpractice claim for failure to supply expert affidavits as required by Minn. Stat. § 145.682?

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STATEMENT OF THE CASE

Petitioner Clyde H. Bellecourt commenced this lawsuit on September 18, 1989, naming as defendants a number of parties, including Dr. Alan Wynne. Appdx. 105. Bellecourt's claims against Dr. Wynne center around the allegation that Dr. Wynne failed to diagnose a myocardial infarction, or heart attack, on the single occasion when Dr. Wynne examined Bellecourt on September 16, 1987. Appdx. 136-37.

On September 16, 1987, Dr. Alan Wynne was working as the overnight on-call physician for the Federal Medical Center in Rochester, Minnesota.[1] Shortly after midnight, Bellecourt, an inmate at the Federal Medical Center, called for medical help, complaining of chest pain. Appdx. 179. Dr. Wynne was summoned and responded promptly. Appdx. 179-80. He went to Bellecourt's cell, examined him, made a preliminary diagnosis of severe

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[1]The answer filed by the United States attorney on behalf of all federal defendants, including Dr. Wynne, described Dr. Wynne as "an employee of the Federal Medical Center." Approximately a year later, separate counsel were retained to represent Dr. Wynne because of a potential issue as to whether his status with respect to the Federal Medical Center was that of an employee or an independent contractor. Although that issue was never formally presented to the district court, the district court in its summary judgment order *sua sponte* ruled that Dr. Wynne was an independent contractor and not an employee. Dr. Wynne cross-appealed to the Eighth Circuit on this claim, but the Eighth Circuit did not reach the issue because it affirmed the judgment dismissing all claims against Dr. Wynne.

indigestion, administered treatment, and waited to make sure that treatment was working. Appdx. 180-81, 129-30. Dr. Wynne directed Bellecourt to call him again if his pain recurred. Appdx. 182. Bellecourt did not ask for Dr. Wynne to return that night. Appdx. 182-83. Bellecourt reported for sick call the following morning. Appdx. 131, 183-84. Later that morning he was diagnosed to have had a heart attack. Appdx. 186.

The essence of Bellecourt's complaint against Dr. Wynne is that Dr. Wynne did not diagnose his heart attack. In his evidentiary submissions in response to the defendants' motions for summary judgment, Bellecourt admitted that he only saw Dr. Wynne on the one occasion, that Dr. Wynne examined, diagnosed and treated him, and that Dr. Wynne advised him to call again if his chest pain recurred after Dr. Wynne's visit. Appdx. 179-82. Bellecourt admitted that he did not call again for Dr. Wynne, even though he claims he continued to experience chest pain. Appdx. 182-83. Bellecourt does not attribute his failure to resummon Dr. Wynne to anything Dr. Wynne said or did. Rather he attributes it to a fear of being placed in solitary confinement by defendant Lieutenant Friese, a prison guard. Appdx. 291.

Bellecourt commenced his action on the last possible day under Minnesota's two-year medical malpractice statute of limitations.. Along with his summons and complaint, Bellecourt filed an affidavit of counsel stating that the affidavit of expert review to support his medical malpractice claim required by Minn. Stat. § 145.682, subd. 3(a) could not reasonably be obtained before commencing the action because the statute of limitations was about to expire. On October 9, 1989, one of the defendants served Bellecourt with a demand for compliance with Minn. Stat. § 145.682. Bellecourt made no response to this demand. Nearly six

months later, on April 4, 1990, Bellecourt served a motion requesting an extension of time through June 7, 1990 to comply with Minn. Stat. § 145.682. Bellecourt never sought a hearing on this motion. The district court docket entries reveal that the motion was never filed with the court. Bellecourt's proposed extended deadline of June 7, 1990, passed without any expert disclosure by Bellecourt. At no time did Bellecourt obtain an order extending the section 145.682 time limits for filing affidavits of expert review and disclosure.

Bellecourt's first attempt to submit any affidavit disclosing experts in compliance with Minn. Stat. § 145.682 came on February 7, 1991, a week after Dr. Wynne's motion for summary judgment. Bellecourt's counsel then filed an affidavit purporting to explain why the expert affidavit had not been filed within the statutory time limits. The district court concluded that Bellecourt had neither complied with the mandatory requirements of § 145.682 nor shown excusable neglect for his failure to do so. The district court found that expert testimony would be necessary to support Bellecourt's medical malpractice claim, and accordingly dismissed the claim in its entirety. The district court further dismissed the Eighth Amendment claim against Dr. Wynne, finding that a claim of misdiagnosis or of disagreement with treatment does not amount to an Eighth Amendment violation. ***Bellecourt v. U.S.***, 784 F. Supp. 623 (D. Minn. 1992).

Bellecourt appealed from the district court's summary judgment order. The Eighth Circuit affirmed the district court's order in all respects. ***Bellecourt v. U.S.***, 994 F.2d 427 (8th Cir. 1993).

SUMMARY OF THE ARGUMENT

Both the district court and the Eighth Circuit properly found that Bellecourt's Eighth Amendment claim against Dr. Wynne must be dismissed for failure to offer any evidence that would establish the requisite culpable state of mind. Construing all of Bellecourt's evidence in the light most favorable to him, at most he has stated a claim against Dr. Wynne of medical negligence. He has utterly failed to establish the requisite "obduracy or wantonness" in Dr. Wynne's diagnosis and treatment to support a claim of deliberate indifference. Dr. Wynne's actions could be characterized as inadvertence or an error in good faith. They did not amount to either deliberate indifference to serious medical needs or a deliberate choice of an easier and less efficacious treatment.

Bellecourt's medical malpractice claim against Dr. Wynne was also properly dismissed. Bellecourt's claim that he should be excused from his noncompliance with Minn. Stat. § 145.682 on the grounds that his medical malpractice claim required no expert testimony was properly rejected by both the district court and the Eighth Circuit. A lay jury could not be expected to know what standard of care to apply to a claim of negligent failure to diagnose a heart attack, nor could they know what diagnostic testing and treatment would be medically required. Moreover, a lay jury would have no basis for assessing the elements of causation and damages without expert testimony. A lay jury must have expert assistance in order to evaluate a claim that an alleged delay in diagnosis of a heart attack caused injury or damage over and above the injury due to the heart attack itself.

REASONS FOR DENYING THE WRIT

I. The Eighth Circuit's Affirmance of Summary Judgment as to Bellecourt's Eighth Amendment Claim Is Consistent With Both the Supreme Court and Other Circuit Court Rulings: Without a Showing of Deliberate Indifference, No Claim Can Survive.

This Court recognized in ***Estelle v. Gamble***, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (citations omitted), that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment." As the ***Estelle*** court indicated, the state of mind of the defendant must amount to deliberate indifference to support a constitutional claim. In ***Whitley v. Albers***, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the Court underscored the importance of the state of mind requirement for Eighth Amendment claims: "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the [Eighth Amendment]." 475 U.S. at 319.

When this Court recently revisited the issue of the standards applicable to prisoners' Eighth Amendment claims in the context of a challenge to conditions of confinement, it again identified the critical issue as the defendant's state of mind. ***Wilson v. Seiter***, ___ U.S. ___, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991). Indeed, the majority opinion in ***Wilson*** described ***Estelle*** as a case in which the inmate's Eighth Amendment claim was rejected because he "had failed to establish that [the prison doctors] possessed a sufficiently culpable state of mind." 111 S.Ct. at 2323. Thus, the focus of an Eighth Amendment medical care claim must be on the

state of mind of the defendant, and not solely on the objective reasonableness of the care provided.[2]

Estelle and its state of mind requirement of deliberate indifference have been the touchstone of subsequent cases addressing Eighth Amendment claims based upon allegedly improper medical treatment of prisoners. For example, in ***Mendoza v. Lynaugh***, 989 F.2d 191, 193 (5th Cir. 1993), the court described the Eighth Amendment plaintiff's obligation in proving the requisite culpable state of mind: "Succinctly stated, negligent medical care does not constitute a valid section 1983 claim. Further, delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference, which results in substantial harm." Numerous other cases have also observed and applied the ***Estelle*** state of mind standard. *See, e.g.*, ***Whitley***, 475 U.S. at 319; ***Wilson***, 111 S.Ct. at 2323; ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995, 998, 117 L.Ed.2d 156 (1992) (appropriate inquiry on claim of failure to attend to serious medical needs is whether officials exhibited deliberate indifference); ***Durmer v. O'Carroll***, 991 F.2d 64, 69 n.13 (3rd Cir. 1993) (plaintiff is not entitled to trial on Eighth Amendment claim by presenting an issue as to whether the medical care provided was adequate; clearly there must also be an issue of fact regarding the defendant's intent); ***DesRosiers v. Moran***, 949 F.2d 15, 19 (1st Cir.

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[2]***Wilson*** distinguished between the "objective" and "subjective" components of Eighth Amendment claims by describing the former as whether an alleged deprivation was sufficiently serious and the latter as whether the officials acted with a sufficiently culpable state of mind. 111 S. Ct. at 2324. Both components are essential; neither is sufficient by itself to support a claim. *Id.*

1991) (to establish deliberate indifference under ***Estelle***, "complainant must prove that the defendants had a culpable state of mind and intended wantonly to inflict pain"); ***McGuckin v. Smith***, 974 F.2d 1050, 1060 (9th Cir. 1992) (in addition to showing the seriousness of the claimed need for medical treatment, the claimant must show a "purposeful act or failure to act on the part of the defendant").

Consistent with ***Estelle*** are those holdings that a deliberate decision "to take an easier and less efficacious course of treatment" may constitute an Eighth Amendment violation. ***Smith v. Jenkins***, 919 F.2d 90, 93 (8th Cir. 1990). These cases preserve ***Estelle's*** focus on the defendant's state of mind. For example, in ***Ancata v. Prison Health Services, Inc.***, 769 F.2d 700, 704 (11th Cir. 1985) (emphasis supplied), one of the "easier and less efficacious treatment" cases relied upon by Bellecourt, the court held:

> [t]he knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference.

Thus, the "easier and less efficacious" standard does not differ from the ***Estelle*** state of mind requirement. Rather, it requires the same thing -- namely, a showing of knowing or intentional refusal to provide needed medical care.

In evaluating whether a claim of deliberate indifference to serious medical needs has been made out, the Court has been careful not to transform the Eighth Amendment into a federal medical malpractice remedy for prisoners. "[A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the

conscience of mankind.' . . . Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." ***Estelle***, 429 U.S. at 105-6 (citations omitted).

The circuits uniformly have followed this mandate. "While poor medical treatment will at a certain point rise to the level of constitutional violation, mere malpractice, or even gross negligence, does not suffice." ***Wood v. Housewright***, 900 F.2d 1332, 1334 (9th Cir. 1990). Likewise, the courts have refused to accept as rising to the constitutional level claims that amount to nothing more than a disagreement over a treatment plan. Thus, in ***Smith v. Marcantonio***, 910 F.2d 500 (8th Cir. 1990), the court held that summary judgment should have been granted dismissing the prisoner's claims: "Because Smith's complaints represent nothing more than mere disagreement with the course of his medical treatment, he has failed to state an eighth amendment claim . . .." 910 F.2d at 502. Similarly, in ***Randall v. Wyrick***, 642 F.2d 304, 308 (8th Cir. 1981), the court held: "Appellant's difference of opinion over matters of expert medical judgment or a prescribed course of medical treatment fails to state a federal constitutional question."

Here, Bellecourt argues that the Eighth Circuit's opinion in this case departs from settled precedent by "abandoning the 'easier and less efficacious' standard," thereby placing the Eighth Circuit in conflict with this Court and with other circuits. Petition at 20, 23. Contrary to Bellecourt's argument, the Eighth Circuit's opinion does not conflict with ***Estelle*** or any of its progeny. Both of the lower courts properly focused on the state of mind requirement to determine whether Bellecourt had offered any evidence that Dr. Wynne was deliberately indifferent to Bellecourt's

medical needs or had made a deliberate decision to take an easier and less efficacious course of treatment.

As summarized in his petition for writ of certiorari, Bellecourt's Eighth Amendment claim against Dr. Wynne reduces to a single assertion: that Dr. Wynne should have ordered an electrocardiogram in order to rule out the possibility that Bellecourt's chest pain was caused by a cardiac problem. Petition at 15. Bellecourt characterizes Dr. Wynne's diagnosis and treatment of severe indigestion as an "easier and less efficacious treatment" than an electrocardiogram.

The sole evidence identified by Bellecourt in support of his position that Dr. Wynne deliberately decided to use an easier and less efficacious treatment is Dr. Wynne's own statement to the Bureau of Prisons. Petition at 12-13 n.2, citing Appdx. 264-65. Contrary to Bellecourt's argument, the only fact established by Dr. Wynne's statement is that Dr. Wynne had no deliberate indifference toward Bellecourt. He did not prescribe an antacid for Bellecourt knowing that Bellecourt was undergoing a heart attack and that the antacid would do no good; he prescribed it because he believed Bellecourt was experiencing indigestion. He did not deliberately decide to refrain from ordering an electrocardiogram knowing that Bellecourt was in cardiac distress and that an electrocardiogram was immediately necessary; instead he decided to see if the antacid would work. He did not abandon Bellecourt without treatment;[3] he

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[3]Contrary to Bellecourt's argument, his expert did not opine that "Dr. Wynne's behavior constituted an abandonment of treatment." *Compare* Petition at 29 *with* Appdx. 340.

prescribed treatment and directed Bellecourt to call him again if his chest pain did not resolve. If Bellecourt's chest pain recurred, Dr. Wynne planned to order an electrocardiogram then.

Bellecourt's Eighth Amendment claim against Dr. Wynne foundered on the absence of any evidence of culpable intent on Dr. Wynne's part. In contrast, the cases relied upon by Bellecourt had strong evidence of "unnecessary and wanton infliction of pain" by the defendant medical providers to establish the culpable state of mind required by ***Estelle*** and ***Wilson***. For example, in ***Miltier v. Beorn***, 896 F.2d 848 (4th Cir. 1990), a wrongful death action on behalf of a prisoner who died of a heart attack while in prison, the evidence showed that the defendant doctor made no effort to follow up on his own recommendation that Miltier be transferred to a cardiology unit, but instead moved him to the general population. In ***Boretti v. Wiscomb***, 930 F.2d 1150 (6th Cir. 1991), the plaintiff's evidence indicated that the defendant nurses failed and refused to carry out the specified medical plan for care of the plaintiff's wound, by refusing to provide clean bandages or the prescribed medications. In ***Ortiz v. City of Imperial***, 884 F.2d 1312 (9th Cir. 1989), the plaintiff's evidence showed that the prison medical staff knew of the deceased prisoner's head injury, but willfully disregarded his complications and prescribed contraindicated sedatives.

The failure of Bellecourt's proof places his claim in the same category as that of the plaintiff in ***Estelle***, which this Court held did not meet constitutional muster:

> [T]he question of whether an X-ray -- or additional diagnostic techniques or forms of treatment -- is indicated is a classic example

> of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment.

429 U.S. at 107. Bellecourt's claim that Dr. Wynne should have ordered an electrocardiogram, like that of the plaintiff in ***Estelle***, boils down to nothing more than a quarrel with Dr. Wynne's diagnosis and treatment. It does not raise a question as to deliberate indifference sufficient to withstand a motion for summary judgment.

Furthermore, contrary to Bellecourt's assertion, the Eighth Circuit and district court did not engage in improper fact finding when they dismissed his Eighth Amendment claims. Rather, both courts performed their required task under Rule 56 of the Federal Rules of Civil Procedure: to determine whether, on the evidence presented by the parties, any genuine issue of material fact existed. Both courts concluded, as to Dr. Wynne, that Bellecourt had failed to offer evidence that Dr. Wynne's conduct toward Bellecourt was anything more than negligent.

Lastly, it is Bellecourt, not respondents, who asks this Court to depart from its own precedents. By focusing his argument on the objective reasonableness of Dr. Wynne's medical judgment instead of on Dr. Wynne's subjective intent, Bellecourt in effect is asking this Court to reject its holdings in ***Estelle***, ***Whitley***, and ***Wilson*** that the hallmark of an Eighth Amendment claim is the defendant's culpable state of mind. Bellecourt would remove the deliberateness from the deliberate indifference standard. Bellecourt could not prove that his claim against Dr. Wynne could amount to anything more than mere negligence, and as shown below, he lost his chance to present a medical malpractice claim by his

failure to satisfy the applicable statutory requirements. He should not be permitted to resurrect that claim by transforming it into a constitutional claim. As this Court emphasized in ***Estelle***, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 106.

II. The Lower Courts Properly Found that Bellecourt Must Have Expert Testimony to Support his Medical Malpractice Claim Against Dr. Wynne.

In his petition for writ of certiorari, Bellecourt's only quarrel with the dismissal of his medical malpractice claim under Minn. Stat. § 145.682 is his objection to the lower courts' holding that he could not pursue his medical malpractice claim without expert testimony to support it. He argues to this Court, as he argued below, that a lay jury could find medical malpractice in this case without the assistance of expert testimony. Nothing could be farther from the truth. Moreover, in applying section 145.682 and the cases under it, the lower courts did not "expand" the expert testimony requirement in any way.

A. Minn. Stat. § 145.682 Establishes the Expert Affidavit Requirement Applicable to Bellecourt's Claim.

Bellecourt's claim of medical malpractice against Dr. Wynne arises under Minnesota state law, and as such must comply with the requirements established by the Minnesota legislature for such claims. *See, e.g.*, ***Oslund v. United States***, 701 F. Supp. 710, 713-714 (D. Minn. 1988) (compliance with Minn. Stat. § 145.682 is necessary in any malpractice claim under Minnesota law, whether in federal or state court). *See also* ***Chizmadia v. Smiley's Point Clinic***,

873 F.2d 1163 (8th Cir. 1989) (discussing section 145.682 as it applies to medical malpractice diversity actions in federal court); ***Vakil v. Mayo Clinic***, 878 F.2d 238 (8th Cir. 1989) (same).

Section 145.682 has two affidavit requirements, one to be met at the very outset of a medical malpractice case and another to be met within 180 days later. First, subdivision 2(1) of the statute requires that an affidavit of expert review, as described in subdivision 3 of the statute, must accompany the service of a medical malpractice summons and complaint. Second, subdivision 2(2) requires that an additional affidavit of expert disclosure, as described in subdivision 4 of the statute, must be served no later than 180 days after commencement of the lawsuit.

The initial expert review affidavit must state that before commencing the lawsuit, plaintiff's counsel reviewed the facts of the case with an expert who is of the opinion that one or more defendants deviated from the applicable standard of care and thereby injured the plaintiff. Minn. Stat. § 145.682, subd. 3(a). Alternatively, the plaintiff's attorney may state that the required expert review could not be obtained in time because of the statute of limitations. *Id.*, subd. 3(b). However, a plaintiff's attorney who elects this latter option must still within 90 days serve an affidavit of expert review. *Id.* Bellecourt served along with his summons and complaint an affidavit asserting that due to the press of the statute of limitations, he could not obtain the expert review necessary under section 145.682 before commencing the action. Under subdivision 3(b), the extended due date for Bellecourt's affidavit of expert review was December 18, 1989. He did not serve it until February 7, 1991, more than a year late.

In the subsequent expert disclosure affidavit, required within 180 days after commencement of suit, plaintiff's counsel must identify each expert to be called at trial, disclose the substance of the facts and opinions to which the expert will testify, and summarize the grounds for each opinion. Minn. Stat. § 145.682, subd. 4. Answers to interrogatories may substitute for the expert disclosure affidavit, provided they are served within the requisite 180 days and contain the required information. *Id.* In this case, Bellecourt's affidavit of expert disclosure was due on March 19, 1990. He did not serve it until February 7, 1991, nearly 11 months overdue and after Dr. Wynne's summary judgment motion had been served.

Together, the two affidavits required by section 145.682 are designed to prevent plaintiffs from initiating and pursuing medical malpractice lawsuits without the expert testimony needed to support them. "The primary purpose of Minn. Stat. § 145.682 is to eliminate nuisance malpractice suits by establishing a process where affidavits of expert review are required to verify the lawsuit's validity." ***Parker v. O'Phelan***, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987), *aff'd by equally divided court*, 428 N.W.2d 361 (Minn. 1988).

Both the statute itself and Minnesota case law applying the statute warn that unexcused noncompliance with the statute will lead to dismissal of the case, exactly as Bellecourt discovered in this action. Section 145.682, subd. 6, states that noncompliance with the statute "results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." *See, e.g.*, ***Moen v. Mikhail***, 454 N.W.2d 422 (Minn. 1990) (where plaintiff offered no evidence to show excusable neglect for noncompliance with

Minn. Stat. § 145.682, summary judgment dismissing medical malpractice claim against defendants must be affirmed); ***Maloney v. Fairview Community Hospital***, 451 N.W.2d 237 (Minn. Ct. App. 1990) (medical malpractice claim properly dismissed for noncompliance with Minn. Stat. § 145.682).

Bellecourt does not dispute that he failed to comply with section 145.682 and that he failed to show excusable neglect for his noncompliance. His only remaining argument is that he should have been allowed to pursue his medical malpractice claim without expert testimony.

B. The Lower Courts Properly Found that Expert Testimony Would be Required to Support a Claim of Negligent Failure to Diagnose and Treat a Heart Attack.

Minnesota courts have regularly held that expert testimony is necessary in all but the most exceptional medical malpractice cases. ***Plutshack v. University of Minnesota Hospitals***, 316 N.W.2d 1, 5 (Minn. 1982), lists the elements that must be proven to establish medical negligence, and specifically states that a plaintiff must "introduce expert testimony" to demonstrate these factors:

> (1) The standard of care recognized by the medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of [plaintiff's] injuries.

Expert testimony is particularly necessary in failure to diagnose cases, which by their very nature call for the application of expertise which a lay jury cannot be expected to have. *See, e.g.*, ***Sorenson v. St. Paul Ramsey Medical Center***, 457 N.W.2d 188 (Minn. 1990) (expert testimony needed to establish negligent failure to diagnose placentio abruptio); ***Smith v. Knowles***, 281 N.W.2d 653 (Minn. 1979) (expert testimony was "crucial" to claims of negligent failure to timely diagnose and treat eclampsia); ***Todd v. Eitel Hospital***, 306 Minn. 254, 237 N.W.2d 357 (1975) (expert testimony needed to support claim of negligent failure to diagnose a malignancy). The court in ***Todd*** explained:

> This is distinctly not the kind of case where the negligence 'speaks for itself' without expert medical opinion, such as where a surgeon leaves a sponge in the body or where there is unexplained injury to a healthy part of the body remote from the treatment area. Where, as here, the conduct of the physician involves the complexities of pathological diagnosis, we are not persuaded that nonmedically-trained jurors are competent to pass judgment.

237 N.W.2d at 361.

The Minnesota Supreme Court has summarized the cases where expert testimony has been held unnecessary in ***Miller v. Raaen***, 273 Minn. 109, 139 N.W.2d 877 (1966). The district court in ***Chizmadia*** analyzed ***Miller*** and the cases it cites as creating a "limited exception" to be applied "in the simplest of fact situations, such as when metal clips or a sponge have been left in the body after surgery, or a dentist's grinding disc has slipped and cut membranes and tissues at

the base of the tongue." 768 F. Supp. at 271. In such cases, there can be no doubt about the breach of duty or about the cause of the result complained of by the plaintiff.

Here, the requirement of expert testimony imposed by Minnesota precedent must be met. Bellecourt himself acknowledged the need for such testimony by initially filing the affidavit to extend the time for providing the affidavit of expert review. Subsequently he served a motion seeking additional time. Lastly, in response to Dr. Wynne's motion for summary judgment, he served an affidavit of expert disclosure. Each of these actions is a recognition of the need for expert testimony.

Indeed, this is the type of claim that cries for expert explanation. Ironically, to avoid the requirement of expert testimony, and presumably in an attempt to illustrate the lack of complexity of the malpractice issues presented by his claim, Bellecourt quotes at length from his own expert's belated affidavit! Petition at 43-44. Far from establishing that a lay jury could identify the standard of care and apply it on its own, Bellecourt instead has shown the need for an expert to explain and apply the applicable standard of care. For example, Bellecourt's quoted expert affidavit states that "a number of medical and surgical procedures that are available" if used during the first hours following a heart attack "can limit or reverse damage." *Id.* at 43. How is a lay jury to know what those procedures are? How can a lay jury identify or quantify damage, including pain, resulting from a heart attack as opposed to damage resulting from an alleged delay in diagnosing a heart attack? Bellecourt's expert goes on to opine that "[i]ncreased physical damage to the heart and arteries may increase the likelihood that a future episode will occur . . ." *Id.* at 44. How is a lay jury to evaluate or even find damage to the heart and arteries?

More to the point, how can a lay jury distinguish between damage to the heart resulting from the heart attack itself and damage resulting from the alleged malpractice? All of these issues would require expert testimony.

One of the cases relied upon by Bellecourt even recognizes the need for expert testimony to establish claims of this type. In ***Miltier***, 896 F.2d at 852, the court held that as to a claim for alleged failure to provide adequate cardiac care, "expert explanation is required to aid the jury in determining the threshold standard of care."

Additionally, Bellecourt erroneously argues that ***Chizmadia*** and ***Vakil*** support his position that no expert testimony is necessary. In both cases, the Eighth Circuit held that the applicability of Minn. Stat. § 145.682 was conditioned upon a finding that expert testimony was necessary. ***Chizmadia***, 873 F.2d at 1165; ***Vakil***, 878 F.2d at 239. On remand, the district court in ***Chizmadia*** even made such a finding and dismissed the plaintiff's claim. ***Chizmadia v. Smiley's Point Clinic***, 768 F. Supp. 266, 271 (D. Minn. 1991), *aff'd* 965 F.2d 647 (8th Cir. 1992). Likewise, here the district court specifically found that Bellecourt must have expert testimony to establish his claim. Accordingly, the precondition for application of section 145.682 has been met, meaning that the district court properly applied the statute to dismiss the medical malpractice claim.

Lastly, Bellecourt's argument that he should have been allowed to supply the requisite expert opinions through Dr. Wynne, medical treatises, or hospital rules is also unavailing. He failed to disclose any of these sources in his expert affidavits. Even if he had, those affidavits were untimely. Trying to resort to Dr. Wynne or these other

sources as his expert does not provide Bellecourt with an escape from section 145.682, but instead highlights his utter failure to comply with the statute. He simply cannot theorize away his failure to provide the requisite affidavits.

CONCLUSION

Bellecourt has failed to raise any issue of significance sufficient to warrant the invocation of this Court's jurisdiction or review of this case. His petition for writ of certiorari should be denied.

Respectfully submitted,

November 17, 1993

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In the Supreme Court of the United States

OCTOBER TERM, 1993

CLYDE BELLECOURT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's dismissal of petitioner's Federal Tort Claims Act (FTCA) suit for lack of subject matter jurisdiction on the ground that petitioner had failed to prove that he "first presented the claim to the appropriate Federal agency" as required by 28 U.S.C. 2675(a).

2. Whether the court of appeals properly affirmed the district court's grant of summary judgment on the issue of whether the misdiagnosis of petitioner's medical condition by a prison doctor constituted "cruel and unusual punishment" under the Eighth Amendment.

3. Whether the court of appeals erred in upholding the district court's dismissal of petitioner's pendent state medical malpractice claim on the ground that petitioner had failed to submit an expert affidavit as required by state law.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-622

CLYDE BELLECOURT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-21) is reported at 994 F.2d 427. The decision of the district court (Pet. App. 23-101) is reported at 784 F. Supp. 623.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1993 (Pet. App. 2), and a petition for rehearing was denied on July 19, 1993 (Pet. App. 22). The petition for a writ of certiorari was filed on October 18, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was confined at the Federal Medical Center, Rochester, Minnesota (FMC-Rochester), from May 5, 1987, through April 15, 1988, serving a five-year term for distribution of LSD. At approximately 12:30

a.m. on September 16, 1987, petitioner complained of chest pains to respondent correctional officer Lieutenant Cliff Friese. Respondent Dr. Alan Wynne, the physician on duty, was summoned to petitioner's cell by Lt. Friese. Dr. Wynne questioned the prisoner about his symptoms and conducted a physical examination. After diagnosing petitioner as suffering from indigestion and gastritis, Dr. Wynne administered an antacid and remained with petitioner until it appeared to him that petitioner's pain had subsided. Dr. Wynne advised petitioner to notify a prison officer if he experienced further pain. An officer checked on petitioner hourly throughout the night and observed petitioner sleeping. Petitioner did not request further medical assistance until he appeared for the 7:00 a.m. sick call at the prison clinic the following morning. An electrocardiogram (EKG) was performed which showed that a heart attack had occurred sometime earlier that morning, prior to petitioner's arrival at the clinic. Pet. App. 5-6.

2. a. Petitioner filed the instant suit on September 18, 1989, against the United States various FMC-Rochester officials[1] and Dr. Wynne[2] seeking monetary damages

[1] The complaint named as defendants: the United States; the Federal Bureau of Prisons; J. Michael Quinlan, in his official capacity as Director of the Federal Bureau of Prisons; FMC-Rochester; Peter Carlson, in his official capacity as Warden of FMC-Rochester; Dr. Michael Trujillo, in his official capacity as Medical Director of FMC-Rochester; Cliff Friese, in his official capacity as a Lieutenant at FMC-Rochester, and individually; the Mayo Foundation; Dr. Wynne in his official capacity as a resident physician for Mayo Foundation and as an employee of FMC-Rochester, and individually; and Sarah Urriste, in her official capacity as a physician's assistant for Mayo Foundation and as an employee of FMC-Rochester, and individually. Pet. App. 105-107.

[2] Because Dr. Wynne was not a federal employee, but an independent contractor with FMC-Rochester at the time of the

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under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics Bureau*, 403 U.S. 388 (1971). Petitioner also alleged violations of his civil rights under 42 U.S.C. 1981 and 1985(3), and asserted a state law medical malpractice claim against Dr. Wynne pursuant to the district court's pendent jurisdiction. Petitioner claimed that the combined acts and omissions of the federal respondents and Dr. Wynne constituted negligence, medical malpractice, discrimination against him as a Native American, and deliberate and wilful indifference to his health and safety resulting in the unnecessary and wanton infliction of physical injury, permanent heart damage, and pain and suffering. Pet. App. 107-110. Based on affidavits and other evidence placed before the district court, see *id.* at 24, the court granted the federal respondents' motion for dismissal of the FTCA claim and for summary judgment on all other claims. *Ibid.*

b. The district court found that petitioner had not properly presented his FTCA claim because he failed to show (in accordance with 28 U.S.C. 2675(a)) that his administrative claim was actually received by the appropriate federal agency. Pet. App. 39. The court therefore dismissed the FTCA claim against the United States for lack of jurisdiction. *Id.* at 48-49. With respect to petitioner's Eighth Amendment claim, the district court concluded that petitioner had not placed sufficient facts in the record to prevail on a claim that respondents had shown deliberate indifference to his serious medical needs. *Id.* at 57-70. The court also found that there was nothing in the record to support petitioner's allegation

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alleged malpractice, he was represented by private counsel in the courts below.

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that respondents discriminated against him in the provision of medical care based on his status as a Native American and on his political activities. *Id.* at 55-57. The court also dismissed petitioner's pendent state law medical malpractice claim against Dr. Wynne for failure to submit an expert affidavit as required by state statute. *Id.* at 92, 100.

3. The court of appeals affirmed. Pet. App. 1-21. The appeals court stated that "[p]resentment of an administrative claim is jurisdictional and must be pleaded and proven by the FTCA claimant." *Id.* at 12. Because the jurisdiction in this case turned on a question of fact, the court held that it would review the district court's findings under the clearly erroneous standard. *Id.* at 10. In view of the district court's finding that petitioner had failed to meet his burden of proving that his "request for administrative remedy"[3] was actually received by the Federal Bureau of Prisons (BOP), the Eighth Circuit held that the district court did not err in dismissing the FTCA claim for lack of jurisdiction. *Id.* at 13.

The court of appeals also upheld the district court's decision to grant the federal respondent's motion for summary judgment on petitioner's Eighth Amendment claim. The court stated that "[t]he fact that Dr. Wynne misdiagnosed the appellant's condition, that his method of physical examination and treatment may not have fol-

[3] Although represented by counsel, petitioner used a form entitled a "request for administrative remedy," or a "BP-9," rather than the appropriate form, Standard Form 95 (28 C.F.R. 14.2), to submit his administrative claim. The court of appeals noted that while petitioner intended to comply with the FTCA despite his use of an incorrect form, undisputed facts in the record established that the "request for administrative remedy" was not mailed by certified mail, was not actually received by the BOP, and did not request money damages. Pet. App. 12-13.

lowed community standards, or that he disagreed with [petitioner's] suggested course of treatment d[id] not amount to deliberate indifference in violation of the Eighth Amendment." Pet. App. 16 (citing *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Smith* v. *Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990); and *Randall* v. *Wyrick*, 642 F.2d 304, 308 (8th Cir. 1981)). The appeals court similarly upheld the district court's grant of summary judgment to respondents on petitioner's civil rights claims, stating that petitioner had provided no evidence in support of his claims of discrimination or conspiracy.[4] Finally, the court of appeals also upheld the district court's dismissal of petitioner's pendent state law medical malpractice claim against Dr. Wynne for failure to submit an expert affidavit as required by state law. The court explained that this was not the "kind of case where the alleged negligence 'speaks for itself' without expert medical opinion." Pet. App. 19 (citing *Todd* v. *Eitel Hospital*, 237 N.W.2d 357, 361 (Minn. 1975)).

ARGUMENT

1. Petitioner first claims that the court of appeals erred in upholding the district court's determination that he failed to prove that he had presented his FTCA claim to the BOP. The FTCA expressly provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim ac-

[4] Petitioner does not challenge the court of appeals' holding on the discrimination and conspiracy claims in his petition for a writ of certiorari. Petitioner also does not challenge the court of appeals' holding, in agreement with the district court, that petitioner failed to raise a genuine issue for trial on his claim that the federal respondents and Dr. Wynne violated Minnesota's medical "bill of rights" for patients. Pet. App. 20-21.

crues." 28 U.S.C. 2401(b). A claim is deemed to have been "presented" when "a Federal agency receives from a claimant * * * an executed Standard Form 95 or other written notification of an incident." 28 C.F.R. 14.2(a).

Petitioner does not dispute that presentment of an administrative claim is a jurisdictional prerequisite to suit under the FTCA. Instead, he argues that the lower courts improperly placed the burden of proving presentment on him and failed to follow "the rule of presumption of receipt upon mailing." Pet. 52. This contention is meritless. The federal courts have long held that an FTCA claimant bears the burden of pleading and proving presentment. See, *e.g.*, *Bailey* v. *United States*, 642 F.2d 344 (9th Cir. 1981) (FTCA claimant has burden of showing presentment); *Barlow* v. *Avco Corp.*, 527 F. Supp. 269, 273 (E.D. Va. 1981) (claimant must prove actual receipt of claim by government). See also *Drazan* v. *United States*, 762 F.2d 56, 58 (7th Cir. 1985) ("mailing is not presenting; there must be receipt"). In light of this settled precedent, the court of appeals correctly affirmed the district court's dismissal of petitioner's FTCA claim based on petitioner's failure to prove that his claim had actually been received.

Even assuming that a presumption of receipt upon mailing arises in FTCA cases,[5] it was amply rebutted here by the government's direct proof of non-receipt. In making this finding, the district court reviewed deposition testimony from prison personnel charged with collecting, distributing, opening, and reading mail from

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[5] Petitioner cites several cases (Pet. 52, 55, 58-59 & n.10) in support of his contention that the court should have applied the presumption of receipt of his claim upon mailing. None of those cases involved the efforts of an FTCA claimant to satisfy the statutory requirement for filing an administrative claim.

prisoners to the warden. None had any recollection of seeing petitioner's claim form, and there was no written record of receipt of the claim. Pet. App. 43-49. Petitioner has not demonstrated that these findings are clearly erroneous.

2. Petitioner argues (Pet. 14-39) that the court of appeals also erred in upholding the district court's grant of summary judgment in favor of respondents on his Eighth Amendment claim. In *Estelle* v. *Gamble*, this Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." 429 U.S. at 104 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)). More recently, in *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2324 (1991), this Court explained that the inmate's claim in *Estelle* that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs was rejected because the inmate had "failed to establish that [the defendants] possessed a sufficiently culpable state of mind." *Wilson*, 111 S. Ct. at 2323. In reaffirming the *Estelle* analysis, the Court explained that "allegations of 'inadvertent failure to provide adequate medical care' or of a 'negligent * * * diagnosis,' simply fail to establish the requisite culpable state of mind." *Wilson*, 111 S. Ct. at 2323 (quoting *Estelle*, 429 U.S. at 105-106). In order to be liable for a violation of the Eighth Amendment, it is not enough for a prison official to be negligent in the delivery of medical care to prisoners; the official must manifest "deliberate indifference" to a prisoner's serious medical needs. *Estelle*, 429 U.S. at 106.

Petitioner argues he was subjected to "cruel and unusual punishment violative of the Eighth Amendment" (Pet. 15) because Dr. Wynne did not order an EKG although petitioner was experiencing symptoms consis-

tent with a heart attack.[6] As the court of appeals held, however, the fact that Dr. Wynne's "method of physical examination * * * may not have followed community standards * * * does not amount to deliberate indifference in violation of the Eighth Amendment." Pet. App. 16. This Court made clear in *Estelle* that not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." 429 U.S. at 105.

In this case, the court of appeals upheld the district court's determination that the facts alleged by petitioner would fail to establish that Dr. Wynne and the other defendants possessed the requisite culpable state of mind of "deliberate indifference" to petitioner's serious medical needs. The court of appeals found that the failure to order an EKG in the context of his case would, at most, constitute an error in medical judgment, but not the obdurate refusal to provide necessary medical care that would represent cruel and unusual punishment. That determination comports with the distinction found in this Court's cases between "deliberate indifference" to serious medical needs, and mere negligence in the provision of medical care. See, *e.g.*, *Estelle*, 429 U.S. at 107 (question whether additional diagnostic techniques are indicated is a classic example of a matter for medical judgment).

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[6] He also asserts that he was abandoned in his cell "in severe pain without treatment." Pet. 15. In rejecting this contention below, the district court found, based on evidence before the court, that a guard checked on petitioner every hour after Dr. Wynne left and found petitioner sleeping. Pet. App. 62. Petitioner presented no evidence supporting his bare allegation that he requested further medical assistance during the night and that he was deliberately denied that care. *Ibid.*

Petitioner contends that the court of appeals in this case, in contrast with courts in other circuits (Pet. 23-38 & nn.3-4), has adopted a *per se* rule altogether "exempt[ing] grossly negligent misdiagnosis utilizing easier and less efficacious treatment" from Eighth Amendment liability. Pet. 38. Petitioner misreads the decision below. The court of appeals did not adopt any *per se* rule. Rather, the court of appeals concluded, based on facts as found by the district court, that Dr. Wynne's care and treatment of petitioner manifested, at most, an error in diagnostic judgment. Pet. App. 16. That fact-bound determination is not clearly erroneous, is fully consistent with the decisions of other courts of appeals cited by petitioner, and does not merit review by this Court.

3. Finally, petitioner urges this Court (Pet. 39-51) to review this case to determine whether the court of appeals erred in upholding the district court's decision to dismiss petitioner's pendent state law medical malpractice claim because petitioner failed to submit an expert affidavit as required by a Minnesota state statute. Even if there were a disagreement among the state and federal courts concerning the proper application of the Minnesota statute to a state malpractice claim, that issue would not warrant review by this Court. In any event, no such disagreement exists. The courts that have applied Minnesota law have sometimes allowed malpractice claims to go forward without an expert affidavit where expert testimony was found unnecessary to establish that a diagnosis or treatment was negligent. See, *e.g.*, *Chizmadia* v. *Smiley's Point Clinic*, 873 F.2d 1163 (8th Cir. 1989); *Bauer* v. *Friedland*, 394 N.W.2d 549 (Minn. Ct. App. 1986), and cases cited at Pet. 40, 45 & n.7. The district court specifically found in this case, however, that the jury required "expert assistance to establish

the standard of care for diagnosing a heart attack," because "[l]ay jurors do not possess the knowledge to differentiate between a heart attack and other potential causes of chest pain." Pet. App. 89-90. The court of appeals reiterated that conclusion by stating that this was not a case in which "the alleged negligence 'speaks for itself' without expert medical opinion." *Id.* at 19.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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